TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 185

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY AND MARYLAND CASUALTY COMPANY, PETITIONERS,

vs.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THIRD COMPENSATION DISTRICT OF UNITED STATES, AND EMIL BRUNO GUBE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 25, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

(35,999)

(35,999)

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, MARCH TERM, 1929

5043

BALTIMORE & PHILADELPHIA STEAMBOAT COMPANY and MARYLAND CASUALTY COMPANY,

vs.

AUGUSTUS P. NORTON, Deputy Commissioner for Third Compensation District of United States, and EMIL BRUNO GUBE

Louis Wagner, Esq.
G. C. Krewson, Esq.

DOCKET ENTRIES

1929.

May 1. Bill of Complaint filed.
" 1. Subpœna exit—returnable May 21, 1929.
" 16. Subpœna returned—on May 3, served as to each defendant and filed.
" 18. Answer by E. B. Gube filed.
Aug. 17. Petition for leave to file amendment to Bill of Complaint filed.

[fol. 2]

1930.

Apr. 14. Argued.
" 28. Opinion, Dickinson, J., upholding conclusion of Deputy Commissioner filed.
May 6. Petition for re-argument and Decree granting petition filed.
June 6. Re-argument.
" 18. Opinion, Dickinson, J., denying motion for re-argument and granting leave to submit decree in conformity with Opinion filed April 28, 1930, filed.
" 30. Decree dismissing Bill of Complaint with costs filed.

1930.

July 16. Assignments of Error filed.
" 16. Petition for appeal and Decree granting petition filed.
" 16. Bond sur appeal by plaintiff in $250 with Maryland Casualty Company, surety and Decree approving same filed.
" 16. Præcipe as to transcript of record sur appeal.
" 16. Stipulation of counsel digesting pleadings and evidence to be used in place of pleadings, etc. in appeal filed.
" 16. Copy of notice of appeal filed.
" 17. Citation allowed and issued.
" 30. " returned—service accepted & filed.

[fol. 3] IN UNITED STATES DISTRICT COURT, MARCH TERM, 1929.

In Equity. No. 5043

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY, a Corp., and MARYLAND CASUALTY COMPANY, a Corporation,

vs.

AUGUSTUS P. NORTON, Deputy Commissioner for Third Compensation District of United States, and Emil Bruno Gube

CONDENSED STATEMENT OF PLEADINGS AND EVIDENCE

Stipulation of Counsel Digesting the Pleadings and the Evidence to be Used in the Place of the Pleadings and Record on Appeal from the Decree of the District Court for the Eastern District of Pennsylvania in the Above-entitled Case, to the United States Circuit Court of Appeals for the Third Circuit, and Stating the Questions for Review by the Circuit Court of Appeals—Filed July 16, 1930

George C. Krewson, Esquire, attorney of record for Emil Bruno, defendant appellee, and Louis Wagner, Esquire, [fol. 4] attorney of record for the Baltimore and Philadelphia Steamboat Company, and Maryland Casualty Company, plaintiffs appellants, hereby agree upon the follow-

ing as the facts for the purpose of obtaining a review of the Decree of the United States District Court for the Eastern District of Pennsylvania in the above entitled case:

Claim filed by Emil Bruno Gube, an employee of the Baltimore and Philadelphia Steamboat Company, a corporation, alleging an accidental injury arising out of and in the course of employment on board ship on navigable waters of the United States on February 17, 1928, and causing total disability thereafter until October 11, 1928, and followed by permanent limitation of motion of the left arm and averring occupation as carpenter at $35.94 per week. Answer filed by steamboat company admitting compensible accident and jurisdiction of the Commissioner and timely notice thereof, and admitting the extent of temporary total disability, but denying permanent disability to the extent averred and denying the wages as averred.

After hearing by the Deputy Commissioner, he made his findings and order, a copy of which is attached hereto and the facts recited therein are accepted as true except the finding regarding the average weekly wages and the number of weeks during which compensation should be paid. Regarding this finding in the Deputy Commissioner's opinion, it is admitted that the amount paid by the employer to the employee during the year prior to the accident including overtime, would average $36.06 a week. It is stipulated as a fact that the claimant was employed to work regularly as a carpenter, to work a regular number of hours per days and days per week for the sum of $31.50 per week and that the employee was to be paid for any work beyond his hours [fol. 5] of regular employment at the same rate as he was paid for his hours of regular employment.

Within the time allowed by law, the employer and insurance carrier as plaintiffs, filed a Bill of Complaint in Equity in the United States District Court for the Eastern District of Pennsylvania seeking

(a) to set aside the Deputy Commissioner's finding of average weekly wage of $36.06 and his award of $24.04 based thereon. And to set up in the place thereof the sum of $31.50 as the average weekly wage and $21.00 as the rate of compensation to be based thereon. And

(b) Seeking to set aside the order for the payment of compensation form the space of 146 weeks and setting up in

the place thereof an order for the payment of compensation during the space of 125.6 weeks.

An answer was filed by the defendant, Gube, asserting that the finding of the Deputy Commissioner was correct both

(a) as to the finding regarding the average weekly wage and also

(b) as to the period of time during which compensation should be paid.

Thereafter in due course, the cause came on for hearing before Honorable O. B. Dickinson, Judge, and after the cause was submitted, the Court filed an opinion indicating that the deputy commissioner was correct both as to finding,

(a) of average weekly wage, and

(b) the period during which compensation should be [fol. 6] paid. The opinion of the District Court is attached hereto and is to be taken as a part hereof. Thereafter, the plaintiffs filed a petition for re-argument seeking to further argue the correctness of the deputy commissioner's finding of the period of time during which compensation should be paid, and in due course, after, the plaintiffs filed a petition for re-argument District Court, Honorable O. B. Dickinson, Judge, presiding, filed an opinion re-affirming the belief of the District Court that the deputy commissioner was correct in his finding of the period of time during which compensation should be paid and denied the motion for re-argument. A copy of which opinion is attached hereto as part hereof.

Thereafter, a Decree in conformity with the opinions filed was presented and entered dismissing the plaintiffs' Bill of Complaint.

From the Decree so entered the plaintiffs appealed to the Circuit Court of Appeals for the third circuit and desire to have reviewed the following questions.

First. Where an employee is by contract paid a fixed weekly sum for certain fixed hours of daily, regular employment, and is also paid for any time worked beyond his hours of regular employment, whether the deputy commissioner erred in calculating the average weekly wage.

Second. Where an accident produces temporary total disability which is followed by a permanent partial disability, and the actual healing period is in excess of the statutory healing period, prescribed for the particular injury, whether the period during which compensation is payable for such injury is limited to the number of weeks specified as compensation for such injury by Section 8, [fol. 7] paragraph c of the Longshoremen's Act.

Louis Wagner, Attorney for Plaintiffs, Appellants.
Geo. C. Krewson, Attorney for Defendant, Appellee.

Endorsed

Approved 7/16/30.

(S.) O. B. Dickinson, Trial Judge.

Copy

United States Employees' Compensation Commission,
Third Compensation District

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act

Case No. 29-4

Emil Bruno Gube, Claimant,

vs.

Baltimore and Philadelphia Steamboat Co., Employer;
Maryland Casualty Co., Insurance Carrier

Compensation Order—Award of Compensation

Such investigation in respect to the above entitled claim having been made as is considered necessary and
[fol. 8] A hearing having been duly held in conformity with law.

The Deputy Commissioner makes the following:

Findings of Fact

That on the 17th day of February, 1928, the claimant above named was in the employ of the employer above

named at Camden, in the State of New Jersey in the Third Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a longshoreman; that in coming down a ladder same slipped, throwing claimant back to the railway below and that the injury consisted of dislocation of the head of the humerus and fracture just below the head of the humerus;

That actual notice of injury was given within thirty days;

That the employer furnished claimant with medical treatment etc., in accordance with Section 7 (a) of the said Act.

That the average weekly wages of claimant in the same occupation for one year prior to the injury were $36.06 and he is entitled to compensation at two-thirds of this amount, $24.04.

That he was totally disabled from February 17th, to October 11, 1928, inclusive, 34 weeks, and has been paid compensation at $21.00 per week for this period amounting to $714.00.

That subsequent to October 11, 1928, compensation was paid at the rate of $4.33 per week to February 21st, 1929, inclusive, amounting to $82.27.

[fol. 9] That permanent partial disability amounting to 40% loss of use of the left arm has resulted from this injury.

Upon the foregoing facts the Deputy Commissioner makes the following

Award

That the employer, the Baltimore and Philadelphia Steamboat Co. and the insurance carrier, the Maryland Casualty Co., shall pay compensation as follows:

At the weekly rate of $24.04 for 146 weeks beginning February 17, 1928, against which they shall have credit for the payments heretofore made, which up to the time of hearing, March 18, 1929, aggregated $796.27.

Given under my hand at Phila., Penna., this 5th day of April, 1929.

Augustus P. Norton, Deputy Commissioner, Third Compensation District.

IN UNITED STATES DISTRICT COURT

OPINION IN RE FINAL DECREE—Filed Apr. 28, 1930

DICKINSON, J.:

This case arises under the Act of Congress extending the principle of injured workmen's compensation to those in longshoremen's employment. These laws have two main objectives. One is to provide a prompt, speedy, simple and [fol. 10] inexpensive method of adjusting compensation; the other to preserve to every one affected by the award made all his legal rights. To reach the first objective in the practical working of the system reliance is placed upon the Deputy Commissioner; to achieve the second recourse is given to the Courts. The Deputy Commissioner has computed the compensation period in the instant case at 146 weeks, and the wage earning capacity of the injured workman at $36.06. The plaintiff complains of the former as longer than the law prescribes and the latter as in fact too high.

The experienced counsel for the plaintiff, whose familiarity with this legislation has given him a firm grasp of the whole subject, has made an analysis of the Act of Congress, which we adopt and follow. The measure of compensation has the dual basis of injury to the workman and his wage earning capacity. The injury is translated into terms of disability. The disability is measured by its extent and duration. We thus have disabilities which are total or partial, permanent or temporary. A third feature is likewise recognized by the Act. Every injury, whatever its extent, requires what is called "a healing time". During this period the disability is total. We thus have in terms of disability five classes of injuries. They are (1) total, (2) partial, (3) permanent, (4) temporary and (5) total for a time and partial thereafter. Injuries of course vary in their nature, extent, duration and required "healing time". The law seeks as best it can to measure compensation by the severity of the injury viewed as a disability by classifying injuries, fixing compensation periods and a healing time, and graduating allowances by fixed percentages. The disability in the instant case was total during the healing time and partial thereafter and is permanent. The scheduled

[fol. 11] compensation time applicable is 312 weeks; the percentage 40 per cent. and the allowed healing time 32 weeks. The actual healing time of course varies with the nature and extent of the injury. The law recognizes this by providing for cases in which the actual healing time exceeds the schedule time by extending the compensation time accordingly. The actual healing time here was 34 weeks, and the excess thus 2 weeks. The elements in the compensation computation thus became as figured by the Commissioner (1) actual healing time 34 weeks; (2) allowed compensation time 314 weeks; (4)) total disability period 34 weeks; (5) remaining partial disability period 280 weeks, and (6) percentage 40 per cent. He accordingly figures the compensation period at 146 weeks as follows:

1. Schedule healing period	32 weeks	
Excess of actual period	2 "	
Actual healing and total disability time		34 weeks
2. Schedule compensation time	312	
Excess allowed	2	
Total compensation time	314	
Less disability time as above	34	
Partial disability time	280	
40% allowed compensation time		112 weeks
Total compensation time		146 weeks

[fol. 12] The plaintiff figures thus:

Schedule compensation time	312 weeks	
Excess allowed	2 "	
40 per cent. of total	314	125.6 weeks

It will be observed that the difference in these computations is that the Commissioner has allowed for total disability as long as it lasted and for permanent partial disability for the remainder of the compensation, while the plaintiff allows only for permanent partial disability but allows it for the whole compensation period.

For the soundness of the construction of the Act of Congress upon which the 125.6 weeks computation is based, the plaintiff relies upon Texas vs. Sheppard, 32 (2nd) Fed. Rep., 300; a regulation of the Commission which followed the ruling and a number of rulings of the New York State Courts construing a New York Statute of like verbiage with the Act of Congress.

We are quite in accord with counsel for defendants that the rights of the injured employee under the Act of Congress are as the United States Statute, as construed by the Courts of the United States, defines them, and that neither the Commission nor the Courts of New York nor both can dictate the meaning of the Statute. This, however, is not the thought conveyed in the opinion of Judge Hutcheson. If a phrase, through judicial interpretation, has come to have a definite fixed meaning when it is bodily incorporated into a Statute, it will be given that meaning in the Statute which it was before interpreted to have. This means no more than that the Legislature has used the phrase in its accepted sense. This is in line with the well [fol. 13] known rule of construction commonly resorted to in cases in which a phrase used in one Act has been judicially interpreted and subsequently incorporated in another Act. It goes no further, however, than that the Courts seek to find the real meaning of the Statute by calling to their aid this as they do other canons of construction, such as that the Courts in construing a Statute may look for light to an executive or administrative construction given it or to the rulings of Courts which have construed like laws. Such interpretations may well be received as persuasive, although not authoritative, otherwise than upon the stare decisis principle. Here we have an interpretation of the law by a Court of the United States adopted and followed by an executive construction and a corresponding change of administrative rulings. It has, because of this, doubly persuasive force and should be followed if it can be accepted.

In the well considered brief of the experienced counsel for the plaintiff the gist of the ruling cited is stated to be that the workman who has sustained temporary total disability and permanent partial disability may claim either temporary total disability for the time it existed or may claim partial disability for the statutory time but cannot claim both when they both resulted from the same injury. This is likewise the meaning given to the ruling in the regulations which followed it. With due deference to the Court which so ruled, we are unable to so read the Act. Its meaning, as we read it, is to give compensation measured, it is true, as the Act prescribed, but to give compensation for temporary total disability, so far as there was total dis-

ability, and for permanent partial disability, so far as it is present up to the percentage allowance. Where the disability is total for a time and partial for the rest of the [fol. 14] time, we cannot read it as requiring the workman to call it one or the other and have his compensation measured accordingly. It is true, of course, that a permanent partial disability began when the injury was sustained and hence runs through the whole compensation period, and in this view it is logical to say that a claim for permanent partial disability is a claim for the whole compensation time from the receipt of the injury. This, however, is not strictly accurate, or at least there is as much truth in saying that during the healing period there was no partial disability but a total disability, and that the partial disability did not begin until the total disability was ended.

The plaintiff recoils from the logical consequences of this view and views the facts as if there had been only a partial disability from the injury and ignores the total disability period altogether, except only that its excess over the statutory healing period lengthens the compensation period.

We cannot see it in any other light than that Congress meant to allow compensation based upon the injuries sustained when disability results both with respect to its extent in what is called its "character" and its duration in what is called its "quality" sense. Exception might perhaps be taken to these quoted words as not very happily chosen but the sense in which they are employed seems clear. The truth is that there are two injuries sustained when expressed in terms of disability—one a temporary total disability and the other a permanent partial disability, and on the principle that the greater includes the less and indeed by the very terms partial and total the partial disability does not exist as long as the total disability lasts. A healing period is a total disability period. Irrespective [fol. 15] of the fact it is assumed to be 32 weeks, and the extension of it beyond the statutory period is made by the Statute to extend the partial disability compensation period. Any argument drawn from this that Congress thereby meant to ignore the total disability period, whenever there was a claim for partial disability, is answered by the thought that if Congress had meant this it would have been easy to have said so. The Act does not in terms

so say, and the meaning of what it does say is, as we read it, that the disability shall, as before stated, be figured in the computation as total as long as it is total and as partial for the remainder of the compensation period. It will be noticed that this means that under the operation of the extension of the compensation period provision, the compensation time upon which the partial disability percentage is figured always is the same (here 280 weeks) no matter what the duration of the total disability. This means that a partially disabled workman shall always receive the partial disability allowance, but when he has suffered in addition a temporary total disability, he shall be allowed additional compensation through having the compensation period correspondingly extended. We think this to be precisely what Congress intended, but we are not persuaded that it was thereby meant he should forego the total disability allowance. The vice, as we view it, of the other construction is that it does not allow for the full time of the duration of the total disability but for only a part (here 40%) of it. We find in the Act no warrant for this curtailment.

The conclusion reached is that the Deputy Commissioner was right in his finding of the time basis upon which compensation is to be figured.

Respecting the finding of the wage basis upon which [fol. 16] compensation is computed, very little need be said. So far as it is a mere fact finding, it should not be disturbed, except for reasons which are here absent. The only law in the question is whether the Commissioner properly construed the Act of Congress. We think he did. Congress clearly meant that the wage basis of the compensation should be the real wage earnings, not only that part of them which is expressed in terms of money. A workman whose wages are a given sum of money for an eight hour day with an hourly wage for overtime, if he works overtime "makes" not the stipulated daily wage but what is paid him for the work he does. What is the daily wage as thus defined is a question of fact. This fact it is the province of the Commissioner to find, and the finding made is accepted as one in accordance with law. Aside from this the figures which express his finding are not only supported by the facts but the facts would have warranted the finding of even a larger sum.

An appropriate decree in acordance with this opinion may be submitted.

IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION FOR REARGUMENT—Filed June 18, 1930

DICKINSON, J.:

The very fair and well considered argument addressed to us on behalf of the plaintiff of itself commands a re-discussion of the whole case. There is agreement all around that except for the ruling in what has come to be called the Texas case, this Bill for review should not prevail as the plaintiff [fol. 17] here could not complain of the ruling of the Commissioner. The pivot point of the ruling in the Texas case, as we read the opinion, is the proposition that a workman may claim for temporary total disability or he may claim for permanent partial disability but he cannot receive both. If that proposition is withdrawn, the reasoning of the opinion is without other support than the other proposition that the rulings of the New York Courts must be read into the Act of Congress.

Counsel for the plaintiff here does not accept the proposition that the workman is driven to an election and so reads the opinion in the Texas case that the Court there did not mean this by the quoted phrase that the workman may claim "either temporary total or permanent partial disability as suits him best but cannot claim both."

We are unable to follow counsel in reading this thought out of the opinion, but, on the contrary, read it to be the point which supplies the fulcrum which gives force to the logic of the opinion. The quoted proposition is what we have called the pivot point of the ruling made. If it is accepted, the reasoning of the opinion and the conclusion reached must be accepted. By the same token, if this proposition be rejected, the reasoning of the opinion is without force.

The Act of Congress, as we analyze it, provides for at least ten different fact situations. Those which concern the instant case are:

1. A temporary total disability.

2. A permanent partial disability.

3. A temporary total disability of 35 weeks, which exceeds the allowed healing period, which is 32 weeks.

[fol. 18] 1. An injured workman is given compensation for total disability (measured by two-thirds of his weekly wage) "during the continuance thereof".

Section 8, clause "b" of the Act.

2. He is given compensation for permanent partial disability for 312 weeks, measured by a like percentage of his wage.

3. As he has suffered from both a temporary total disability and a permanent partial disability, the compensation is increased by lengthening the time of compensation from 312 to 315 weeks.

Section 8, clause "c", sub-section 22.

Three observations may be here made. One is that there is not a word of suggestion anywhere in the Act that this compensation be cut down for any reason. Another is that the total disability compensation is to continue as long as the disability lasts and then cease but the partial disability compensation is for a time fixed by the Act. A third is that the Act when thus construed provides an easily working programme but difficulties are introduced under any other construction because the workman cannot know the duration of a total disability until it ends.

We have said there is not a word of suggestion of the curtailment of the compensation in fact situations such as that here presented. It is only by going outside of this case to another which a different fact situation presents, that we have a suggestion of the thought of a cutting down.

The final provision in sub-division 22 of clause c of Section 8 is that in cases of certain injuries (which include the type of injury here) the compensation shall be limited to [fol. 19] the time allowed by the Act for permanent partial disability. This is the provision upon which plaintiff relies. It is clear, however, that this provision has no application to the present case as it is restricted to a wholly different class of cases, to wit, those in which the total dis-

ability existed for a short time only. We see no force in the argument which is always made whenever a time limit is fixed on anything. Here it is presented in the question why did Congress allow for temporary total disability and also for an increased compensation for permanent partial disability in the case of one whose total disability lasted for longer than 32 weeks and limit compensation to the partial disability allowance when the total disability lasted only for less than 32 weeks? We can see very good reasons for Congress making a difference between cases in which the total disability period is extended and those in which it is transient. Whenever, however, any line is drawn, the difference in the situation of one who is just over the line and another who is just short of it is never very great.

The motion for a re-argument is denied and a decree in conformity to the opinion before filed may be submitted.

IN UNITED STATES DISTRICT COURT

DECREE—Filed June 30, 1930

Before Dickinson, J.

And now, to wit, this 30th day of June A. D. 1930, it appearing to the Court that the above case came on to be heard in due course on pleadings and proofs and arguments of counsel, and the cause having been duly submitted, and upon due consideration,

[fol. 20] It is ordered, adjudged and decreed that the Bill of Complaint in the above entitled cause be and the same is hereby dismissed with costs.

By the Court.

Attest:

George Brodbeck, Clerk.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS—Filed July 16, 1930

To the Honorable the Judges of said Court:

The petition of the plaintiffs respectfully represents as follows:

1. The plaintiff, Baltimore and Philadelphia Steamboat Company, is a corporation duly authorized to transact business in the Commonwealth of Pennsylvania.

2. The plaintiff, Maryland Casualty Company, is a corporation organized under the laws of the State of Maryland, and duly licensed to transact business in the Commonwealth of Pennsylvania.

3. The defendant, Augustus P. Norton, is Deputy Commissioner for the third compensation district of the United States. And the defendant Emil Bruno Gube was an employee of the Baltimore and Philadelphia Steamboat Company, a corporation.

4. The plaintiffs herein were defendants in proceedings [fol. 21] before Deputy Commissioner Norton in a claim for compensation made against them by Emil Bruno Gube, who was an employee of the plaintiff steamboat company.

5. That said Gube filed a claim with the defendant, Norton for compensation for injuries due to an accidental injury arising out of and in the course of the employment and that after hearing was held, said Norton on April 5, 1929, made certain findings of fact to the effect that said Gube was injured on February 17, 1928, and disabled to October 11, 1928, a period of thirty-four weeks and that his average weekly wages were $36.06 and that he was entitled to compensation at two-thirds thereof, or $24.04 a week and that claimant's injury resulted in a permanent partial impairment of the use of the left arm, amounting to 40% thereof and ordered the defendants to pay the claimant the sum of $24.04 a week for one hundred and forty-six weeks, beginning February 17, 1928, and crediting the defendants with payments aggregating $796.27.

6. Thereafter within the time allowed by law, the plaintiffs filed a Bill of Complaint to review the findings and order of said Norton as not being in accordance with law and seeking to have the enforcement thereof enjoined and set aside insofar as they were not in accordance with law.

7. That an answer was filed to said Bill of Complaint by the defendant Gube but no answer was filed by the defendant, Norton.

8. That thereafter the cause came on for hearing before the District Court for the Eastern District of Pennsyl-
[fol. 22] vania and said Court through Dickinson, Judge, filed an opinion indicating that the Court would enter a Decree dismissing the Bill.

9. Thereafter a petition for re-argument was filed by the plaintiffs and upon consideration of the same, the District Court for the Eastern District of Pennsylvania, through Dickinson, Judge, filed an opinion indicating that the re-argument would not be allowed and that a Decree dismissing the Bill would be entered.

10. That thereafter in conformity with the opinion of the District Court, a Decree dismissing the Bill was entered.

11. The above named plaintiffs conceiving themselves aggrieved by the refusal of the District Court to grant the relief prayed for, and by the entry of the Decree dismissing the Bill, made and entered on the 30th day of June, 1930, do hereby appeal from said Order and Decree to the United States Circuit Court of Appeals for the third circuit for the reasons specified in the assignments of error attached hereto and filed herewith and pray that the appeal may be allowed and that a transcription of the record proceedings and papers upon which said Order and Decree were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the third circuit.

Louis Wagner, Attorney for Petitioner.

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Before Dickinson, Judge

The foregoing claim of appeal is allowed. Bond for costs in the sum of $250.00 to be entered.

By the Court.

Attest:

Leo A. Lilly, Deputy Clerk.

Dated July 16, 1930.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR TO THE ENTRY OF A DECREE DISMISSING BILL OF COMPLAINT—Filed July 16, 1930

And now, to wit, this — day of July, 1930, comes the above mentioned plaintiffs, Baltimore and Philadelphia Steamboat Company and Maryland Casualty Company, both corporations, and say that the order or decree made and entered herein on the 30th day of June, 1930, dismissing the Bill of Complaint, and refusing to grant the relief prayed for in the Bill of Complaint is erroneous and against the just right of such complainants for the following reasons:

1. The District Court erred in refusing to enter a Decree granting the plaintiffs the relief prayed for.

2. The District Court erred in entering a Decree dismissing the plaintiffs' Bill as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, MARCH TERM, 1929

No. 5043

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY, a Corporation, et al.,

vs.

AUGUSTUS P. NORTON et al.

[fol. 24] Decree

Before Dickinson, J.

And Now, to wit this 30th day of June A. D. 1930, it appearing to the Court that the above case came on to be heard in due course on pleadings and proofs and arguments of counsel, and the cause having been duly submitted, and upon due consideration,

It is Ordered, Adjudged and Decreed that the Bill of Complaint in the above entitled cause be and the same is hereby dismissed with costs.

By the Court:

—— ——, J."

Attest: George Brodbeck, Clerk.

3. The District Court erred in ruling that money earned by an employee for overtime work was properly considered by the Deputy Commissioner in calculating the average weekly wage. The opinion of the Court being as follows:

"Congress clearly meant that the wage basis of the compensation should be the real wage earnings, not only that part of them which is expressed in terms of money. A workman whose wages are a given sum of money for an eight hour day with an hourly wage for overtime, if he works overtime 'makes' not the stipulated daily wage but what is paid him for the work he does. What is the daily wage as thus defined is a question of fact. This fact it is the province of the Commissioner to find, and the finding made is accepted as one in accordance with law. Aside from this the figures which express his findings are not only supported by the facts but the facts would have warranted the finding of even a larger sum."

[fol. 25] 4. The undisputed testimony shows that the defendant, Gube, worked under an express contract for a stipulated sum of money. And the deputy commissioner notwithstanding the express contractual wage calculated an average wage. And the District Court erred in failing to set aside the calculation of the average wage and in not recognizing the contractual wage as the basis for compensation. The District Court erred in holding as follows:

"The only law in the question is whether the Commissioner properly construed the Act of Congress. We think he did. Congress clearly meant that the wage basis of the compensation should be the real wage earnings, not only that part of them which is expressed in terms of money. A workman whose wages are a given sum of money for an eight hour day with an hourly wage for overtime, if he works overtime 'makes' not the stipulated daily wage but what is paid him for the work he does."

5. The injury to the defendant, Gube, produced a temporary total disability and was followed by a permanent partial disability, and the District Court erred in not limiting compensation and in holding as follows:

"The final provision in sub-division 22 of clause 'c' of Section 8 is that in cases of certain injuries (which include

the type of injury here) the compensation shall be limited to the time allowed by the Act for permanent partial disability. This is the provision upon which plaintiff relies. It is clear, however, that this provision has no application to the present case as it is restricted to a wholly different class of cases, to wit, those in which the total disability existed for a short time only."

Louis Wagner, Attorney for Plaintiffs.

[fol. 26] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 16, 1930

To the Clerk:

In making up the transcript of record sur appeal in the above case record the following papers:

1. Docket Entries.
2. Stipulation of Counsel containing digest of pleadings and evidence, and agreeing that such digest be accepted in the place of the pleadings and evidence in conjunction with the finding of the Deputy Commissioner and the Opinions of the District Court, as the facts for review by the Circuit Court of Appeals.
3. Petition for Appeal.
4. Order allowing appeal.
5. Assignments of Error.
6. This Stipulation.
7. Certificate of Clerk.

Louis Wagner, Attorney for Plaintiff. Geo. C. Krewson, Attorney for Defendant.

[fol. 27] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 28] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1930

No. 4457 (List No. 66)

Balto. & Phila. Steamboat Co. et al., Appellants,

vs.

A. P. Norton, Dep. Comm'r, and Emil Bruno Gube, Appellee-

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Order Assigning Judge—Filed Nov. 12, 1930

And now, to-wit this 12th day of November, A. D. 1930, it is ordered that Hon. J. Whitaker Thompson, District Judge, for the Eastern District of Pennsylvania, be, and he is hereby assigned to sit in above case in order to make a full court.

Joseph Buffington, Circuit Judge.

[File endorsement omitted.]

[fol. 29] Minute entry of argument and submission, November 12, 1930, omitted in printing.

[fol. 30] In United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Plaintiff's (Appellants') Calculation of Proper Award—Filed Nov. 15, 1930

The defendant Gube has a permanent injury to his arm and his loss amounts to 40% thereof.

Allowed by Section 8 (c) (1) for the loss of an arm ..... 312 weeks

Defendant, Gube's actual disability	34 weeks	
Statutory healing period allowed by Section 8 (c) (22) and included in the 312 weeks allowed by 8 (c) (21)	32 weeks	
Actual healing in excess of statutory healing period	2 weeks	
Excess of actual healing period above statutory healing period allowed by Section 8 (c) (22), to be added to the allowance under 8 (c) (1)		2 weeks
Total		314 weeks

Maximum allowance to injured employee under 8 (c) (1) plus excess of actual healing above statutory healing allowed by Section 8 (c) (22) for the loss of the whole arm	314 weeks
Allowance to the defendant employee under 8 (c) (19) for proportional loss of use, or 40% of 314 weeks	125.6 "

[fol. 31] Actual weekly wage of the defendant employee under his contract of hire	$31.50
Rate of Compensation under 8 (c), two-thirds [redacted] $31.50 or	21.00
Amount of defendant Gube's award in money is 125.6 times $21.00 or	2,637.6

Note

If employee's contention that his claim is not limited by Section 8 (c), under what section of the Act is the subtraction of 34 weeks justified before calculating the percentage of loss. If employee's contention is correct, he should receive the 34 weeks actual disability plus 40% of 314 weeks.

Respectfully submitted.

Louis Wagner, Attorney for Plaintiff, Appellant.

Copy sent Geo. C. Krewson, Esq.

[File endorsement omitted.]

[fol. 32] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

CALCULATION OF AWARD OF COMPENSATION TO APPELLEE GUBE AS FOUND BY THE DEPUTY COMMISSIONER AND CONFIRMED BY THE UNITED STATES DISTRICT COURT—Filed Nov. 19, 1930

The Appellee, Gube, sustained a temporary total disability of 34 weeks and a permanent partial disability as to 40% loss use of arm.

To allowance by Section 8 (b) for temporary total disability		34 weeks
To allowance by Section 8 (c) (1) for loss of arm	312 weeks	
Add excess of healing period allowed by Section 8 (c) (22)	2 "	
Total compensation time	314 "	
Less temporary total disability period	34 "	
	280 "	
40% of 280 weeks as per Section 8 (c) (19) for proportionate loss of use of arm		112 "
Total		146 "
[fol. 33] Average weekly wage earning capacity		$36.06
Rate of compensation under 8 (b) and (c) at two-thirds of $36.06		24.04
Total amount of compensation for 146 weeks at $24.04		3,509.84

In reply to Appellants' note appended to their Calculation of Award it is submitted that under Section 8 (c) (22) it would seem to be the intention of Congress as to this part of the Act that the normal healing period should run concurrently with that provided for permanent partial disability but any excess over the former should be added to the latter and then the actual healing period deducted from

the total of the two periods. By this method of computation effect is given to both (b) and (c) of Section 8.

Respectfully submitted.

Geo. C. Krewson, Attorney for Appellees.

[File endorsement omitted.]

[fol. 34] In United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Order for Reargument—Filed Dec. 1, 1930

And now, to-wit, December 1, 1930, after due consideration,

It is ordered that a reargument be had during the week of December 8th in the above entitled case, not to exceed a half hour on each side.

Philadelphia, ——— —, ———.

Per Curiam:

Buffington, Circuit Judge.

[File endorsement omitted.]

[fol. 35] Minute entry of reargument and submission, December 11, 1930, omitted in printing.

[fol. 36] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1930

No. 4457

BALTIMORE & PHILADELPHIA STEAMBOAT COMPANY and MARYLAND CASUALTY COMPANY, Appellants,

v.

AUGUSTUS P. NORTON, Deputy Commissioner for the Third Compensation District of the United States, and Emil Bruno Gube, Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Before Buffington and Woolley, Circuit Judges, and Thompson, District Judge

OPINION—Filed March 25, 1931

WOOLLEY, Circuit Judge:

Emil Bruno Gube, an employee of the Baltimore & Philadelphia Steamboat Company, on descending from a boat of this company, then in navigable waters of the United States, fell and sustained an injury to his left arm. He instituted proceedings against his employer for compensation under the Longshoremen's and Harbor Workers' Compensation Act. Approved March 4, 1927. 44 Stat. 1424; 33 U. S. C. A. Sec. 901-950. The Maryland Casualty [fol. 37] Company was joined as insurance carrier for the Steamboat Company.

At a hearing before the Deputy Commissioner for the proper Compensation District it appeared that the claimant was totally disabled for a period of thirty-four weeks and that, thereafter, he was permanently disabled by a partial loss of use of his arm, estimated at 40 per cent. It also appeared that his regular weekly wages were $31.50 and his average weekly wages including wages for overtime were $36.06. On the Deputy Commissioner's award of compensation for 146 weeks at the weekly rate of $24.04, being two-thirds of the average weekly wages, the Steam-

boat Company and Casualty Company filed a bill for review in the District Court of the United States averring that the Deputy Commissioner should not have included the claimant's overtime earnings in the wage factor of compensation and that instead of the claimant being entitled to 146 weeks' compensation, he was entitled to compensation for only 125.6 weeks. The District Court sustained the findings and award of the Deputy Commissioner both in respect to the amount of weekly compensation and the period of payment. 40 Fed. (2d) 530. The Steamboat Company and the Casualty Company join in this appeal. Three questions are involved: two raised by the appellants and one arising out of an inquiry of our own as to whether the questions are moot in view of the fact that the Steamboat Company, the employer, has paid its injured employee the compensation awarded.

Of course if the questions in this case were moot we should not decide them. If moot as to one party, we think they are not as to the other. True, the Baltimore & Philadelphia Steamboat Company paid its employee the compensation awarded, as it was bound to do, without awaiting an appeal. (Section 921.) If the Steamboat Com-
[fol. 38] pany were the only party to the action the question might, conceivably, be moot. But there are two parties; the Steamboat Company, the principal, and the Maryland Casualty Company, the assurer on the obligation to the employee. The Casualty Company is a real party here. It still desires and has a right to demand that the question of proper payment as affecting its liability to its principal be decided. If the Steamboat Company unwisely or improvidently paid a compensation claim which in law it was not required to pay, that is not a reason why the Surety Company should pay the Steamboat Company and, similarly, that is not a reason why the Surety Company should not have the question tried out and decided so as to fix its legal liability. We hold the questions are properly here for review; and they are two, both dealing with compensation, one reckoned in dollars and the other in weeks.

The first is whether in estimating the compensation to be paid weekly to the injured employee his weekly wages ($31.50) under a contract as to days and hours should control, or the amount of actual wages earned and paid ($36.06) which include not only his weekly wages but also

wages earned outside the time of the contract. Stated differently, the question is whether the compensation should be based on regular weekly wages fixed by contract of employment or on actual weekly wages earned for a period long enough to determine an average. As the statute accords the injured employee compensation for wages lost, we think the compensation should conform to actual wages which, but for the accident, he would have earned. And so, evidently, thought the learned district judge, whose finding in this regard is affirmed.

The next question calls for an interpretation of the vital part of the Longshoremen's and Harbor Workers' Compensation Act because it is the money part of the Act. The [fol. 39] purpose of this Act, as its title denotes, is to provide compensation to an injured longshoreman for his "disability", or incapacity occasioned by an injury, to earn the wages he had ben receiving. (Section 2, paragraph 10 of the Act.) The provision of the Act pertinent to this case is Section 8 (U. S. C. A. Title 33, Sec. 908) which provides a method of computing such compensation to employees who have suffered injuries of different kinds resulting in disabilities of different characters and different qualities. First stating these differences in injuries and in their characters and qualities, the statute then deals with an employee's compensation (in dollars) for lost wages reckoned by weeks. As the statute speaks in figures rather than in words, we find it difficult to construe its terms in the abstract and feel compelled to follow its own structure and devote our interpretation more to figures than to words, believing that out of the figures which the Congress used and out of the order in which it used them its intent will stand out clearly and, we think, with certainty.

Section 8 provides compensation for different degrees of disability:

(a) Permanent total disability;
(b) Temporary total disability;
(c) Permanent partial disability; and
(d) Temporary partial disability.

We are not concerned in this case either on the facts or in interpreting the law with (a) Permanent total disability or (d) Temporary partial disability. The claim-

ant was totally disabled for a time and partially disabled for all time. Therefore we are concerned only with (b) and (c), Temporary total disability and Permanent partial disability, for it is manifest that these two things can [fol. 40] happen, as they did in this case, to one individual as a result of the same accident.

Sub-section (b) of Section 8, dealing with temporary total disability alone, provides that:

"In case of disability total in character (which means that the man is wholly incapacitated to earn a wage) but temporary in quality (which means that though total for a time, the disability may later become partial or disappear altogether) 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof."

But a man may suffer a permanent partial disability without suffering a temporary total disability. In that event sub-section (c) of Section 8 provides:

"In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, and shall be paid to the employee, as follows:

"(1) Arm lost, three hundred and twelve weeks' compensation.

"(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member (in this case an arm) may be for proportionate loss or loss of use of the member." (In this case found to be 40 per centum.)

Yet a man may suffer both a temporary total disability, which is sometimes referred to as the healing period, and a permanent partial disability as in this case. On that combined event paragraph 22, sub-section (c) of Section 8 provides that:

"In case of temporary total disability and permanent partial disability, both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation

provided in subdivision (c) of this section: Arm, thirty-two weeks; * * *"

"The compensation provided by subdivision (c)" for permanent partial disability to an arm is, as we have seen, [fol. 41] 312 weeks. The excess of temporary total disability over the thirty-two weeks provided by paragraph 22 of sub-section (c) is in this case two weeks, making thirty-four weeks of temporary total disability. As only the "excess" of thirty-two weeks is to be "added" to the 312 weeks, it is clear that the thirty-two weeks healing period is included in the 312 weeks compensation period for loss of an arm or of its use. Adding the excess of total disability (two weeks) to the latter period, the figures in this case stand as follows: 312 weeks plus 2 weeks equal 314 weeks. This figure of 314 weeks now includes disability of both kinds. Compensation for each measured in weeks must be separated in this total because the law deals with them differently. The thirty-four weeks for temporary total disability must be picked out and set aside. To determine the period of payment for permanent partial disability the thirty-four weeks of temporary total disability must be deducted from the total of 314 weeks. This leaves 280 weeks compensation for permanent partial disability. This is for the reason that temporary total disability stands alone; the disability being total, compensation is allowed for it, without deduction or apportionment (Section (b)), to the full two-thirds of the man's weekly wages. But compensation for the remainder of the term (280 weeks), which represents the weeks following temporary total disability and constitutes all the period of permanent partial disability for which compensation is allowed, is subject to apportionment of loss provided by paragraph 19 of sub-section (c) which has in this case been determined to be 40 per cent. of the use of the arm. Now it is just here that, for the first time, apportionment of loss enters into the calculation, and it enters, as it must, at the place in the calculation where sub-section (c) (19) puts it, namely: under the heading of "permanent partial disability" (280 weeks). [fol. 42] Thus there are two separate and distinct figures in the calculation, each a resultant of different sub-sections of Section 8 in question. One, under sub-sections (b) and (c), (temporary total disability), is thirty-four weeks, on which the claimant gets all the law allows without deduc-

tion or apportionment, and the other under sub-section (c), (permanent partial disability), where he gets only 40 per cent. of what the law allows if the disability were total, whether temporary or permanent.

If this method of computation were not pursued but that of the appellants followed, namely; adding the two weeks excess healing period (c-22) to the total 312 weeks (c-1), and then apportioning the sum of these items, there would be an apportionment of 40 per cent. on the thirty-four weeks of temporary total disability with respect to which the statute requires no apportionment.

This would defeat the intent of the Congress to allow full compensation when the disability is total and for "the continuance thereof". The practical or money difference in the two theories of calculation is the difference between 146 weeks and 125.6 weeks and is more clearly disclosed by the following tables:

We figure thus:

Allowance by Section 8 (b) and C-22 for temporary total disability			34 weeks
Allowance by Section 8 (c) (1) for loss of arm	312	weeks	
Add excess of healing period allowed by Section 8 (c) (22)	2	"	
Total compensation time	314	"	
[fol. 43] Less temporary total disability period	34	weeks	
Permanent partial disability period	280	"	
40% of 280 weeks as per Section 8 (c) (19) for proportionate loss of use of arm			112 weeks
Total			146 weeks

The appellants figure thus:

Schedule compensation time, Section 8 (c) (1)	312	weeks	
Excess allowed by Section 8 (c) (22)	2	"	
40% of total	314	"	125.6 weeks

The appellants interpret the statute, and, indeed, some authorities interpret a similar state statute, on the theory that although a man may suffer two kinds of injury from the same accident, he cannot claim compensation for both temporary total disability and permanent partial disability, but most elect the compensation payable for one or the other as suits him best. As we read the statute we see in it the plain intent of the Congress to provide compensation for five situations, four occurring with single disabilities as in (a); (b), (c) and (d), and the fifth, (C-22), where temporary total disability and permanent partial disability occur jointly when both result from the same injury. Following that intent, it is clear that, two kinds of disabilities having been suffered, the compensation applicable to each should be paid so long as, within the statute's limitations, disabilities of these two characters continue respectively; and it is equally clear that as the statute distinguishes between the character of the disabilities and the time of their duration, the compensation should conform to each re- [fol. 44] spectively; and that where, as in temporary total disability, the statute provides no deduction or apportionment, none should be made, and in the other (permanent partial disability) where it provides an apportionment, one should be made yet only for the period of weeks to which compensation for disability of that "character" relates.

Another sentence in paragraph 22 of sub-section (c) which it is thought has a bearing on the interpretation of the statute is the following:

"In any case resulting in loss or partial loss of use of arm * * * where the temporary total disability does not extend beyond the period above mentioned (32 weeks) for such injury, compensation shall be limited to the schedule contained in subdivision (c)."

This provision, it would seem, was inserted to meet a situation not covered by the previous paragraphs and subsections. However that may be, the temporary total disability in this case did extend beyond the period (32 weeks) previously provided and, accordingly, the quoted paragraph has no bearing on the matter in hand.

The decree of the District Court dismissing the bill is affirmed.

A true Copy.
Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 45] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1930

No. 4457 (List No. 66)

Baltimore & Philadelphia Steamboat Co. et al., Appellants,

vs.

A. P. Norton, Dep. Comm'r, and Emil Bruno Gube, Appellees

Decree—Filed Mar. 25, 1931

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed, with costs.

Philadelphia, March 25, 1931.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] Supreme Court of the United States

Order Allowing Certiorari—Filed October 19, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,999. U. S. Circuit Court of Appeals, Third Circuit. Term No. 185. Baltimore and Philadelphia Steamboat Company and Maryland Casualty Company, petitioners, vs. Augustus P. Norton, Deputy Commissioner for Third Compensation District of United States, and Emil Bruno Gube. Petition for a writ of certiorari and exhibit thereto. Filed June 25, 1931. File No. 35,999.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. .....

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY and MARYLAND CASUALTY COMPANY,

Petitioners,

vs.

AUGUSTUS P. NORTON, Deputy Commisssioner for Third Compensation District of United States,

and

EMIL BRUNO GUBE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioners, Baltimore & Philadelphia Steamboat Co. and Maryland Casualty Co. pray that a writ of certiorari issue to review the final decree of the United States Circuit Court of Appeals for the Third Circuit, *R. 44*, entered March 25, 1931, which affirmed a decree of the United States District Court for the Eastern District of Pennsylvania. *R. 19 and 20.*

Jurisdiction.

The judgment below was entered March 25, 1931. Jurisdiction of this court is provided by 28 U. S. C., Sec. 347(a).

Opinions Below.

The District Court opinion is reported in 40 Fed. (2d) 530. The opinion of the United States Circuit Court of Appeals is reported in 48 Fed. (2d) 57.

Question Presented.

The question presented is the construction of a federal statute, to wit: Sec. 8 of the "Longshoremen's and Harbor Workers' Compensation Act". 33 U. S. C. §908.

That section deals with the computation of the amount of compensation to be awarded to an injured employee. By the method of computation used by the court below, the employee received compensation for 146 weeks. By the method of computation urged by this petitioner, the employee would have received compensation for only 125.6 weeks. By the method of computation used by other Federal Courts, he would have received 126.8 weeks.

Whether the court below is correct, or whether the petitioner is correct, depends upon the interpretation and construction of Section 8 of the Act.

Although the difference between the two methods of computation when measured in dollars in this particular case is small, the principle involved is of vital concern, both to employees and employers and their insurance carriers throughout the United States.

Ever since the passage of the Act, the question here presented has been in controversy. There have been conflicting decisions on the question by widely scattered Fed-

eral Courts, which have resulted in varying interpretations by the United States Employees' Compensation Commission.

THE FACTS.

Emil Bruno Gube, on February 17, 1928, while in the employ of the petitioner, Baltimore & Philadelphia Steamboat Co., sustained an injury to his left arm while he was working as a longshoreman on a vessel lying in navigable waters of the United States. *R. 4, 8.* Gube filed a claim for compensation under the Act* against his employer and the petitioner, Maryland Casualty Co., which was the insurance carrier for the employer. *R. 4, 9.*

After a hearing the Deputy Commissioner, Augustus P. Norton, respondent herein, made findings of fact and granted an award of compensation for 146 weeks at a certain rate. *R. 7, 8, 9.*

This award was made against the petitioner, Baltimore & Philadelphia Steamship Co., as the employer and against the petitioner, Maryland Casualty Co., as the insurance carrier. *R. 9.*

Thereupon and in conformity with the method provided by Sec. 21 of the Act,† both petitioners filed a bill of com-

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* Longshoremen's & Harbor Workers' Act, 33 U. S. C. § 908.

† Sec. 21 (33 U. S. C. § 921) reads as follows:

"Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in

plaint in the United States District Court for the Eastern District of Pennsylvania, seeking,—

(a) To set aside the Deputy Commissioner's finding that the average weekly wage was $36.06, and to set aside his award based thereon of $24.04 per week; and

(b) To set aside the order for compensation for 146 weeks and to substitute therefor an order for compensation for only 125.6 weeks.

To this bill of complaint an answer was made by the respondent Gube, only. The Commissioner, Norton, against

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which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceedings unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918."

whom the proceeding was also brought, did not file any answer. *R. 5 and 21.*

The matter came on for hearing before Honorable O. B. Dickinson, District Judge, who filed an opinion sustaining the award of the Deputy Commissioner. A decree was entered dismissing the bill. *Opinion, R. 9,* reported at 40 Fed. (2d) 530, *Opinion on Reargument, R. 16, Decree, R. 19.*

Thereafter petitioners appealed to the United States Circuit Court of Appeals for the Third Circuit, which affirmed the decree of the District Court. Its opinion is reported in 48 Fed. (2d) 57. *R. 35 to 43.*

The petitioners do not here seek to review the decision of the court below upon the rate of compensation. The sole question which the petitioners ask to have reviewed is that dealing with the number of weeks for which compensation should run.

The full text of the pertinent parts of Sec. 8 is as follows:

"Sec. 8. Compensation for disability shall be paid to the employee as follows:

. . . . . .

"(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

"(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, and shall be paid to the employee, as follows:

"(1) Arm lost, three hundred and twelve weeks' compensation.

. . . . . .

"(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

"(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

"(22) In case of temporary total disability and permanent partial disability, both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision (c) of this section: Arm, thirty-two weeks; leg, forty weeks; hand, thirty-two weeks; foot, thirty-two weeks; eye, twenty weeks; thumb, twenty-four weeks; first finger, eighteen weeks; great toe, twelve weeks; second finger, twelve weeks; third finger, eight weeks; fourth finger, eight weeks; toe other than great toe, eight weeks.

"In any case resulting in loss or partial loss of use of arm, leg, hand, foot, eye, thumb, finger, or toe, where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision (c)."

It will be seen that when a man is totally disabled for a temporary period he receives compensation as long as he is so disabled. Subsection (b). However, when he is partially disabled, but permanently so, he receives compensation according to a fixed schedule. Subsection (c). Thus the complete loss of an arm results in the payment of 312 weeks compensation and a partial loss or loss of use of an injured member results in a proportionately smaller number of weeks.

In case the permanent partial disability is combined with a temporary total disability, then the injured man receives the compensation provided as per schedule but the schedule is increased by adding to it the number of weeks by which the period of total disability exceeds a certain stated period called the healing period. Subsection (c), paragraph (22). If on the other hand the period of temporary total disability does not exceed the fixed healing period stated in paragraph 22 nothing is added at all.

The Deputy Commissioner found that Gube was totally disabled for 34 weeks and that he suffered a permanent partial disability, amounting to 40% of the use of his arm. *R. 8, 9.* These findings are not disputed.

There is only a question of law involved. It is how many weeks compensation Gube should be allowed for such injuries.

The court below allowed Gube 146 weeks. The petitioners contend that he should have been allowed only 125.6 weeks.

The court below calculated its 146 weeks as follows:

Allowance by Section 8 (b) and c-22 for temporary total disability		34 weeks
Allowance by Section 8 (c) (1) for loss of arm	312 weeks	
Add excess of healing period allowed by Section 8 (c) (22)	2 "	
Total compensation time	314 "	
Less temporary total disability period	34 weeks	

Permanent partial disability period	280 weeks	
40% of 280 weeks as per section 8 (c) (19) for proportionate loss of use of arm		112 weeks
Total		146 weeks

The petitioners calculated their 125.6 weeks as follows:

Schedule compensation time, Section 8 (c) 1	312 weeks	
Excess allowed by Section 8 (c) (22)	2 "	
40% of total	314 "	125.6 weeks

The reasons given by the Court for its computation were as follows:

Congress intended that a man suffering both types of disability should always be paid for both types of disability. It was said that it was the intent of Congress to allow full compensation for total disability during "the continuance thereof"; and in addition thereto to provide compensation for permanent partial disability according to the schedules.

In following this thought the court first allowed Gube 34 weeks for total disability under subsection (b). It then proceeded to estimate his compensation for permanent partial disability under the schedule in subsection (c). In doing so, it added two weeks to the schedule award of 312 weeks, because the total disability period was two weeks in excess of the healing period of 32 weeks. Subsection (c), paragraph (22). The total compensation time was, therefore, 314 weeks. Since, of this total compensation time Gube had already been awarded 34 weeks for total disabil-

ity, it was considered unjust that the employer should be required to pay for those 34 weeks again, and therefore the 34 weeks were deducted from the schedule loss, of 314 weeks, leaving as a balance, which was described as the permanent partial disability period (schedule loss), 280 weeks. Since Gube was only partially disabled to the extent of 40% he was allowed an award of 40% of the 280 weeks. This amounted to 112 weeks. The court then added the 34 weeks of total disability and reached the result of 146 weeks.

It was pointed out to the court that the last sentence in paragraph 22 of subsection (c) was important in that it indicated that Congress had a contrary intent to that found by the court. The subsection reads as follows:

"In any case resulting in loss or partial loss of use of arm . . . where the temporary total disability does not extend beyond the periods above mentioned (32 weeks) for such injury, compensation shall be limited to the schedule contained in subdivision (c)."

The court, however, refused to consider that sentence because the facts of the present case did not bring it within it. The court, however, did not give full force and effect to that sentence in searching for the intent of Congress.

The importance of the sentence becomes apparent by comparing the number of weeks which Gube would have received under it had it been applicable with those which he received under the court's opinion. If Gube had been totally disabled for only 32 weeks, instead of 34 weeks, Gube by the very words of the discarded sentence would have been entitled to 40% of 312 weeks, namely: 124.8 weeks. Nevertheless, the court said that because he was disabled two weeks more he should receive 21.2 weeks more compensation.

It is contended by the petitioners that Congress never intended any such absurd result and it is absolutely essential in finding the intention of Congress to consider the last sentence of paragraph 22 of subsection (c).

The petitioners arrive at their figure of 125.6 weeks for the following reasons:

Subsection (b) applies solely to a person having that type of disability and no other, viz.: temporary total disability.

Subsection (c) applies to persons having that type of disability, viz.: permanent partial disability, and also to persons having that type of disability combined with temporary total disability.

In short, Congress has specifically provided in subsection (c) for the combination of temporary total disability and permanent partial disability, such as Gube had. Congress having made this provision, subsection 8 (b) is totally irrelevant here.

Therefore, since Gube had both types of disability, he came within the express provisions of subsection (c), paragraph 22, and was entitled to have his schedule loss increased by two weeks, making a total of 314 weeks, and to receive 40% of that total, namely: 125.6 weeks.

The petitioners' contention is reenforced by a consideration of the last sentence of paragraph 22, subsection (c), where the clear intent of Congress to limit compensation to the schedule loss in subsection (c) is apparent in cases where both types of disability exist.

By the express terms of that sentence, if Gube had been totally disabled only 32 weeks he would have been entitled solely to 124.8 weeks' compensation. The mere fact that he was disabled two weeks longer, viz., 34 weeks, should

not increase his compensation by 21.2 weeks, as the court found. The petitioners' computation would increase it from 124.8 weeks to 125.6 weeks.

If the petitioners are wrong in their contention, the utmost that the compensation should be increased is two full weeks, to 126.8 weeks, which was the method adopted by the District Courts of the Southern District of Texas and the Western District of Washington. *Texas Employers' Insurance Assn.* v. *Sheppeard,* 32 F. (2d) 300; *Grays Harbor Stevedore Co.* v. *Marshall,* 36 F. (2d) 814.

Reasons for Granting the Petition.

1. There are two District Court decisions contrary to the decision here sought to be reviewed. They are *Texas Employers' Insurance Assn.* v. *Sheppeard,* 32 F. (2d) 300, D. C., S. D. of Texas; *Grays Harbor Stevedore Co.* v. *Marshall,* 36 F. (2d) 814, D. C. W. D. Wash.

The result of these two decisions is that in Texas and Washington the amount of compensation awarded is different from that awarded in the states embraced by the Third Circuit, although the Act itself is national in character and intended to have uniform operation throughout the United States.

2. Cases are arising almost daily before the various Deputy Commissioners, in which this question must be decided. In those districts where the Gube case is followed the employer and insurance carrier are compelled to pay increased amounts which in the aggregate will become oppressive.

3. There are other methods of computation besides those mentioned in this case. *Texas Employers' Ins. Assn.* v. *Sheppeard, supra,* and *Grays Harbor Stevedore Co.* v.

Marshall, supra. Those decisions gave the employees decidedly less than the Circuit Court of Appeals in the Gube case, but gave them a little more than the petitioner is here contending for.

The United States Employees' Compensation Commission, 2nd Compensation District, located in New York, has further refined the decision in the case at bar, by apportioning the healing period (subsection (c), paragraph (22)) in accordance with the percentage of loss of use. Subsection (c), paragraph (19). This has resulted in almost every instance in a protracted healing period which has increased the awards. No warrant for this is apparent anywhere in the act.

All of these divergent interpretations may be settled by a decision by this court on the point involved in the present case.

June 24, 1931.

Respectfully submitted,

BALTIMORE & PHILADELPHIA STEAMBOAT CO.,
MARYLAND CASUALTY CO.,

By

IRA A. CAMPBELL,
CLETUS KEATING,
VERNON S. JONES,
RAYMOND PARMER,
Of Counsel.

I hereby certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of the court; and that it is not filed for the purpose of delay.

VERNON S. JONES.

BRIEF IN SUPPORT OF PETITION.

The jurisdictional facts, proceedings, and opinions below are stated in the petition.

POINT I.

THE ACT DOES NOT PROVIDE FOR DOUBLE COMPENSATION.

The court below has said that the act shows an intent of Congress to give an employee two types of compensation, one for temporary total disability and the other for permanent partial disability. Inasmuch as the two types of compensation are described in separate paragraphs it would follow from this premise that Gube, for example, should have received 34 full weeks for his temporary total disability and 40% of 314 weeks for his permanent partial disability or a total of 159.6 weeks. This, it is admitted, would compensate Gube twice for the period of 34 weeks. In order to avoid such double compensation to which it should have been driven by its premise, the court arbitrarily said that it would not give Gube the full compensation for his permanent partial disability. In other words it deducted from 314 weeks, which the statute [subsection (c)] expressly allowed him, the 34 weeks for which he was being paid temporary total disability [subsection (b)]. Instead, therefore, of giving him 40% of 314 weeks it gave him 40% of 280 weeks. The court said:

> "As we read the statute we see in it the plain intent of the Congress to provide compensation for five situations, four occurring with single disabilities as in (a), (b), (c) and (d), and the fifth, (C-22), where temporary total disability and permanent par-

> tial disability occur jointly when both result from the same injury. Following that intent, it is clear that, two kinds of disabilities having been suffered, the compensation applicable to each should be paid so long as, within the statute's limitations, disabilities of these two characters continue respectively; and it is equally clear that as the statute distinguishes between the character of the disabilities and the time of their duration, the compensation should conform to each respectively; and that where, as in temporary total disability, the statute provides no deduction or apportionment, none should be made, and in the other (Permanent partial disability) where it provides an apportionment, one should be made yet only for the period of weeks to which compensation for disability of that 'character' relates."

The significant part of the above quotation are the last four lines, viz.:

> "where it provides an apportionment, one should be made yet only for the period of weeks to which compensation for disability of that 'character' relates."

This is nothing less than a statutory interpolation. There is nowhere in the Act any indication that the compensation for permanent partial disability shall be diminished from the periods set forth in the schedules. The act (Par. 22) provides only for increasing the schedules. Notwithstanding this the court has arbitrarily reduced the schedule compensation from 314 weeks to 280 weeks.

As pointed out above, this was done in order to avoid paying to Gube double compensation for the period during which he was totally disabled; that is, once under subsection (b) and again under subsection (c).

If, as the court maintained, Congress intended that Gube should have the two types of compensation, then he should have received double compensation. The fact that the court avoided this result indicates both that it was not Congress's intention to provide for double compensation nor to give the two types of compensation in the one case.

If it was not the Congressional intent to give an injured employee double compensation (and no one suggests that that was the Congressional intent), then it follows that Congress did not intend to give an injured employee two types of compensation for the same injury. To give the two types of compensation for the same injury logically demands the payment of double compensation, unless the anomalous result reached by the court below is substituted for the plain words of the statute.

The only method by which the words of the statute may be fully respected is on the assumption that Congress intended that an injured man should receive one type of compensation and one only. This is the contention of the petitioner.

In Gube's case the facts found by the commissioner show that he had a combined temporary total disability and a permanent partial disability. To his case only one provision of the statute is applicable, and that is subsection (c), paragraph (22). Under this provision Gube would receive a percentage of his schedule loss plus the excess healing period. This is just what Congress said he should receive.

That this is the true Congressional intent is revealed by comparing with Gube's case the results in cases where the disability is greater and cases where the disability is less than Gube had. For instance, if Gube had lost his en-

tire arm he would have had a permanent partial disability. The sole award to him would have been the full schedule loss of 312 weeks provided by subsection (c), subdivision (1), viz: 312 weeks' compensation. To this would have been added the two weeks by which his total disability exceeded the statutory healing period of 32 weeks. Paragraph 22. It has never been suggested by anyone that any more than this amount should be given to a man who has completely lost his arm. Indeed the Compensation Commission itself in its opinion on this section of the act has stated that that is just what such a man would receive. Opinion #34 of United States Employees' Compensation Commission January 3, 1929 reported in 1929, American Maritime Cases, p. 100. This amounts to an admission that only one type of disability is compensable even though both types are present.

As a further example there should also be considered the case of a man who has less temporary total disability than Gube. Assuming that Gube had been totally disabled only 32 weeks instead of 34 weeks, there can be no possible dispute that he would not be entitled to anything but 40% of 312 weeks under subsection (c). To give him a further award under subsection (b) for a total disability would be flying in the face of that part of paragraph (22) which reads as follows:

> "In any case resulting in loss or partial loss of use of arm, leg, hand, foot, eye, thumb, finger, or toe, where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision (c)."

It was this sentence which the court below disregarded.

These two examples show that Congress had a consistent plan throughout. One section and one section only would have been applied to Gube if his permanent partial disability had been greater or his temporary total disability had been less, and the rule would have operated to give him a greater amount of compensation or a lesser amount of compensation depending upon the particular facts. There is no reason why the same section should not apply to the actual injury which Gube had. An intent that the statute be consistently applied is to be presumed.

In *Texas Employers Ins. Assn.* v. *Sheppeard,* 32 F. (2d) 300, D. C. S. D. Texas, the court set aside the order of the commissioner, which was based upon a computation by the same method as adopted by the court in the instant case. The court said, page 301:

> "That plaintiff is right, and that the method pursued by the commissioner was wholly arbitrary, and not only not supported by, but in the face of, the controlling section of the law, I think entirely plain."

The Compensation Act of the State of New York reads literally the same as the Federal Act here under consideration. The New York Act was passed in 1924, and the Federal Act was passed in 1927. It is fair to assume that the latter was copied from the former.

The New York Act has not been interpreted as the court below has interpreted the Federal Act. On the contrary, awards under similar sections of the New York Act have been computed in precisely the manner adopted by the courts in the cases of *Texas Employers Ins. Assn.* v. *Sheppeard, supra,* and *Grays Harbor Stevedore Co.* v. *Marshall,* 36 F. (2d) 814.

The following is a quotation from the New York State Department of Labor, Special Bulletin No. 161, issued in August, 1929, p. 103. This is the official publication of the Industrial Board, which is authorized to administer the New York Act:

> "In applying Subdivision 4-a of Sec. 15, the New York Department of Labor makes no distinction between total loss and partial loss. If an employee has lost 25 per cent of his hand, instead of the entire hand, the Department adds to the 61 weeks representing the 25 per cent the number of weeks of temporary total disability in excess of 32 weeks; that is, if the temporary total disability lasts 45 weeks, the employee will receive 61 weeks plus 13 weeks, a total of 74 weeks. By contrast, in applying the identical provisions of the Federal Longshoremen's and Harbor Workers' Compensation Act, the United States Employees' Compensation Commission (Opinion No. 34, January 3, 1929) does make a distinction between total loss and partial loss. In the above instance of loss of 25 per cent of the hand and 45 weeks temporary total disability, it subtracts the 45 weeks from 244 weeks, the schedule allowance for the entire hand, adds the 13 weeks excess and divides by 4, giving 53 weeks. To this it adds the 45 weeks, making a total compensation of 98 weeks as compared with the total of 74 awarded in New York."

The same method of computation as was used by the Districts Courts of the Southern District of Texas and the Western District of Washington was not disturbed by the court in New York in the case of *Eppenstein* v. *Adams & Co.*, 224 A. D. 332, affd. 250 N. Y. 562.

It is respectfully submitted that the intent of Congress has been disregarded in the decision below.

Respectfully submitted,

IRA A. CAMPBELL,
CLETUS KEATING,
VERNON S. JONES,
RAYMOND PARMEE,
Counsel for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1931—No. 185.

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY and MARYLAND CASUALTY COMPANY,
Petitioners,

vs.

AUGUSTUS P. NORTON, Deputy Commissioner for Third Compensation District of United States,

and

EMIL BRUNO GUBE,
Respondents.

BRIEF IN BEHALF OF PETITIONER.

STATEMENT.

This case comes up on writ of certiorari to the Circuit Court of Appeals for the Third Circuit to review a decree affirming a final decree of the District Court for the Eastern District of Pennsylvania. The District Court's decree was entered in favor of the respondents in an injunction proceeding brought to suspend and set aside the order of Augustus P. Norton, Deputy Commissioner for the Third Compensation District of the United States. The order was made by the Deputy Commissioner under the provisions of the "Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Sec. 908."

The commissioner did not write an opinion.

The opinion of the District Court in favor of the respondents is reported in 40 Fed. (2d) 530, R. 7 to 12. The printed opinion on reargument is not reported. It is printed in R. 12 to 14. The opinion of the Circuit Court of Appeals, affirming the decision of the District Court, is reported in 48 Fed. (2d) 57, R. 24 to 30.

The decree of the Circuit Court of Appeals was filed on March 25, 1931. Certiorari was granted on October 19, 1931.

Jurisdiction of this court is invoked under Sec. 347 (a) Title 28, of U. S. Code.

The Proceeding.

The action below was a statutory proceeding commenced under Sec. 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Sec. 908.

It reads as follows:

"Sec. 21 (a) A Compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and

processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceedings unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18."

The Facts.

Emil Bruno Gube, on February 17, 1928, while in the employ of the petitioner, Baltimore and Philadelphia Steamboat Co., sustained an injury to his left arm while he was working as a longshoreman on a vessel lying in navigable waters of the United States. R. 3, 5, 6. Gube filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, against his employer and the petitioner, Maryland Casualty Co., which was the insurance carrier for the employer. R. 3, 6.

After a hearing the Deputy Commissioner, Augustus P. Norton, respondent herein, made findings of fact and granted an award of compensation for 146 weeks at a certain rate. R. 5, 6.

This award was made against the petitioner, Baltimore and Philadelphia Steamboat Co., as the employer, and against the petitioner, Maryland Casualty Co., as the insurance carrier. R. 6.

Thereupon and in conformity with the method provided by Sec. 21 of said Act, petitioners filed a bill of complaint in the United States District Court for the Eastern District of Pennsylvania, seeking,

(a) To set aside the Deputy Commissioner's finding that the average weekly wage was $36.06, and to set aside his award based thereon of $24.04 per week; and

(b) To set aside the order for compensation for 146 weeks and to substitute therefor an order for compensation for only 125.6 weeks.

To this bill of complaint, answer was made by the respondent Gube, only. The Commissioner, Norton, against

whom the proceeding was also brought, did not file an answer. R. 4, 15.

The matter came on for hearing before Honorable O. B. Dickinson, District Judge, who filed an opinion sustaining the award of the Deputy Commissioner. A decree was entered dismissing the bill. R. 14. The original opinion is reported in 40 Fed. (2d) 530. R. 7 to 12. An opinion was also rendered on reargument but not reported. R. 12 to 14.

Thereafter petitioners appealed to the United States Circuit Court of Appeals for the Third Circuit, which affirmed the decree of the District Court. Its opinion is reported in 48 Fed. (2d) 57. R. 24-30.

The petitioners do not here seek to review that part of the decision of the court below which found that because of overtime the weekly wage was $36. The sole question on which review is asked is that dealing with the number of weeks for which compensation should run.

The Deputy Commissioner found that Gube was totally disabled for 34 weeks, and that he suffered a permanent partial disability amounting to 40% of the use of his arm. R. 6. These findings are not disputed.

The Question Involved.

There is only a question of law involved. It is: under what provisions of Sec. 8 of said Longshoremen's and Harbor Workers' Compensation Act is compensation to be allowed for a temporary total disability (lasting 34 weeks) and permanent partial disability (amounting to 40%), both resulting from the same injury to respondent's arm; does the Act authorize first, an allowance for a temporary total disability of 34 weeks under Sec. 8 (b), and second, an allowance for a permanent partial disability of 40% of 280

(*i. e.* 314—34) weeks (under Sec. 8 (c) (1), (19) and (22)), making a total of 146 weeks; or does the Act prescribe that the allowance for the combined injuries shall be 40% of 314 weeks under Sec. 8 (c), (1), (19) and (22), or a total of 125.6 weeks?

The Decisions Below.

Both the District Court and the Circuit Court of Appeals, upholding the award of the Commissioner, held that under the Longshoremen's and Harbor Workers' Compensation Act respondent was entitled to compensation for a temporary total disability for 34 weeks (Sec. 8, Subdiv. 6), and for a permanent partial disability of 40% of 280 weeks, being an allowance of 314 [under Sec. 8 (c) (1), (19) and (22)] less the 34 weeks allowed for temporary total disability (under Sec. 8 (b)), making the total award 146 weeks.

ARGUMENT.

POINT ONE.

THE COMPENSATION FOR THE COMBINED INJURIES SHOULD BE FOR 40% OF 314 WEEKS UNDER SEC. 8 (c), (1), (19), (22), OR 125.6 WEEKS.

As the injured party, respondent Gube, suffered a temporary total disability of thirty-four weeks, and a permanent partial disability of 40% of the use of his arm, his right to compensation is governed by the provisions of Section 8 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Sec. 908. The question before this Court

is one of construction of the applicable provisions of that section. The provisions of Sec. 8 involved in the controversy are the following:

"Sec. 8. Compensation for disability shall be paid to the employee as follows:

* * * * * * *

"(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

"(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, and shall be paid to the employee, as follows:

"(1) Arm lost, three hundred and twelve weeks' compensation.

* * * * * * *

"(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

"(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

* * * * * * *

"(22) In case of temporary total disability and permanent partial disability, both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision (c) of this section: Arm, thirty-two weeks; leg, forty weeks; hand, thirty-two weeks; foot, thirty-two weeks; eye, twenty weeks; thumb, twenty-

four weeks; first finger, eighteen weeks; great toe, twelve weeks; second finger, twelve weeks; third finger, eight weeks; fourth finger, eight weeks; toe other than great toe, eight weeks.

"In any case resulting in loss or partial loss of use of arm, leg, hand, foot, eye, thumb, finger or toe, where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision (c)."

It is petitioner's contention that inasmuch as this is a case of temporary total disability and permanent partial disability, both resulting from the same injury, respondent's rights are governed by subsection (22) of Sec. 8 and the other provisions [(c), (1), (19)] of Sec. 8 therein referred to.

Subsection (22) expressly provides in such case (*i. e.*, of temporary total disability and permanent partial disability, both resulting from the same injury):

"* * * If the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision (c) of this section: Arm, thirty-two weeks; * * *."

Respondent's period of temporary total disability being 34 weeks, exceeded the aforementioned schedule by 2 weeks. These 2 weeks, then, were to be added to the compensation period provided in subdivision (c), which period for a lost arm was 312 weeks, making a total of 314 weeks. As the partial disability was only 40%, the total number of weeks allowable under the provisions of subsection (19) of subdivision (c) was 40% of 314 weeks, or 125.6 weeks.

It is, however, arguable that the 40% should first be taken of the 312 weeks, namely, 124.8 weeks, and the excess 2 weeks then added, making the total compensation period 126.8 weeks.

We respectfully submit that this is the proper construction of the statute, and the only one which can be given consistently with the second paragraph of subsection (22). The latter provides:

"In any case resulting in loss or partial loss of use of arm, leg, hand, foot, eye, thumb, finger or toe where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision (c)."

That is to say, if respondent's temporary total disability had not extended beyond 32 weeks his compensation would have been limited to 40% of the 312 weeks provided in subdivision (c), (1), (19), (22). This is exclusive because it applies to *any* case involving a loss or partial loss of a member, and *all* compensation is limited to the schedule in subdivision (c). An additional allowance for the period of temporary total disability could not be made.

As Congress saw fit to limit the period of compensation to 312 weeks in any case resulting in the loss or partial loss of the use of an arm where the temporary total disability did not extend beyond 32 weeks, then it cannot, we submit, be consistently argued that, because the temporary total disability extended 2 weeks beyond the scheduled 32 weeks (*i. e.*, to 34 weeks), the period of compensation should be enlarged, not merely by the additional 2 weeks but by 21.2 weeks, as has been done by the Commissioner and the lower courts.

It may be asserted by respondent that this fails to give full compensation for a temporary total disability during the period of its continuance.

From the provisions of subsection (22), it seems quite obvious that the framers of the legislation reasoned in this manner: they determined that 312 weeks was proper compensation for the loss of an arm, including a period of temporary total disability (commonly called the healing period) which they apparently assumed in the average case would not exceed 32 weeks. In allowing the 312 weeks compensation for permanent partial disability, they included in such allowance compensation for the healing period of 32 weeks. This by the second paragraph of subsection (22). However, the healing period might extend beyond the 32 weeks, and thus by the same principle they compensated for the additional period of temporary total disability by commensurately enlarging the compensation for permanent partial disability. They did this by adding the excess of the healing period over 32 weeks to the 312 weeks allowed for the permanent partial disability. In this way the period of total disability is consistently cared for.

Congress very evidently regarded this as doing adequate justice as it was formulating a scheme of compensation applicable to all the various types of cases that could arise. It is clear that Congress deemed the compensation prescribed in Subdivision (c) (1) (22) adequate for a permanent partial loss of an arm or use of an arm with a temporary total disability, where the period of temporary total disability did not exceed 32 weeks (Sub-division (c) (22)). Thus, if the construction for which petitioners contend can be said to fail to give full compensation for temporary total disability during the entire period of its continuance, then Congress failed to provide for it where the period did not

extend beyond 32 weeks. But it cannot be said that Congress failed, for the right to compensation is a grant by Congress. If the grant proves insufficient, Congress, and not the administrative officers or the courts, alone can correct this condition.

The construction for which petitioner contends is entirely consistent with the provisions of the second paragraph of Sub-section (22), because the excess period of temporary total disability over the scheduled 32 weeks (in the instant case 2 weeks) is added to the schedule period of Sub-division (c) and the allowance is based on the total. In this manner Congress has clearly compensated for the full period of temporary total disability and permanent partial disability resulting from the same injury. If this were not so, there would be no sound reason for directing that the excess period of temporary total disability be added to the time allowed in subdivision (c) (1) for the permanent partial disability. This is the only theory upon which such addition can be justified.

Simply because a total disability period happens to extend beyond 32 weeks (in case of a partial loss of an arm), why should it be thought that Congress intended to apply an entirely different principle of compensation than when the period was 32 week or less? It is not for us to question the adequacy of the compensation. Congress determined that and it should be presumed to have acted with entire consistency in formulating its scheme of compensation.

The construction for which petitioner contends has been sustained by two district courts and by the practice followed by the New York Compensation Commission in its administration of the New York Workmen's Compensation Act, from which the Longshoremen's and Harbor Workers' Compensation Act was very evidently patterned, because it closely follows the latter in its terms.

In *Texas Employers' Insurance Association* vs. *Sheppeard*, 32 F. (2d) 300, D. C. S. D. Texas, the District Court set aside the order of the Commissioner which was based upon a computation by the same method as adopted by the courts in the instant case. The Court said, at page 301:

"That plaintiff is right, and that the method pursued by the Commissioner was wholly arbitrary, and not only not supported by, but in the face of, the controlling section of the law, I think entirely plain."

Substantially the same question was involved in *Grays Harbor Stevedore Co., et al.* v. *Marshall, et al.*, 36 Fed. (2d) 814, defendant therein making practically the same contention as to the provisions of the statute which were applicable and the construction properly to be given them. The Court said:

"That the statute contemplates compensation for both temporary total and permanent partial disabilities is clear, but to be measured and computed as the statute directs is equally clear. It would seem that (22) sustains defendants' contention; * * *"

Awards under similar sections of New York Workmen's Compensation Laws have been computed in precisely the manner adopted by the courts in the last two mentioned cases. The following is a quotation from the New York State Department of Labor, Special Bulletin No. 161, issued in August, 1929, page 103. This is the official publication of the Industrial Board, which is authorized to administer the New York Act.

"In applying Subdivision 4-a of Sec. 15, the New York Department of Labor makes no distinction between total loss and partial loss. If an employee has lost 25 per cent of his hand, instead of the entire hand, the Department

adds to the 61 weeks representing the 25 per cent the number of weeks of temporary total disability in excess of 32 weeks; that is, if the temporary total disability lasts 45 weeks, the employee will receive 61 weeks plus 13 weeks, a total of 74 weeks. By contrast, in applying the identical provisions of the Federal Longshoremen's and Harbor Workers' Compensation Act, the United States Employees' Compensation Commission (Opinion No. 34, January 3, 1929) does make a distinction between total loss and partial loss. In the above instance of loss of 25 per cent of the hand and 45 weeks temporary total disability, it subtracts the 45 weeks from 244 weeks, the schedule allowance for the entire hand, adds the 13 weeks excess and divides by 4, giving 53 weeks. To this it adds the 45 weeks, making a total compensation of 98 weeks as compared with the total of 74 awarded in New York."

This basis of compensation in a case of temporary total disability and permanent partial disability was not disturbed in *Eppenstein* vs. *Adams & Co.*, 224 A. D. 332, affd. 250 N. Y. 562.

Consistency only follows under the construction petitioners place upon the statute. It fails completely if it is to be given the construction, as the courts below did, by which an excess total disability period of two weeks results in adding 21.2 weeks to the period of compensation.

The court below has said, and its decision is based upon the theory, that the Act shows an intent of Congress to give an employee two types of compensation, one for temporary total disability and the other for permanent partial disability, even though they arise out of the same injury. Inasmuch as the two types of compensation are described in separate paragraphs it would follow from this premise that respondent, for example, should have received 34 full

weeks for his temporary total disability and 40% of 314 weeks for his permanent partial disability, or a total of 159.6 weeks. This, it is admitted, would compensate respondent twice for the period of 34 weeks. In order to avoid the double compensation to which it would have been driven by its premise, the court arbitrarily held that it would not give respondent the full compensation for his permanent partial disability. In other words it deducted from 314 weeks, which the statute [subdivision (c)] expressly allowed him, the 34 weeks for which he was being paid temporary total disability [subdivision (b)]. Instead, therefore, of giving him 40% of 314 weeks it gave him 40% of 280 weeks. The court said:

"As we read the statute we see in it the plain intent of the Congress to provide compensation for five situations, four occurring with single disabilities as in (a), (b), (c) and (d), and the fifth, (C-22), where temporary total disability and permanent partial disability occur jointly when both result from the same injury. Following that intent, it is clear that, two kinds of disabilities having been suffered, the compensation applicable to each should be paid so long as, within the statute's limitations, disabilities of these two characters continue respectively; and it is equally clear that as the statute distinguishes between the character of the disabilities and the time of their duration, the compensation should conform to each respectively; and that where, as in temporary total disability, the statute provides no deduction or apportionment, none should be made, and in the other (permanent partial disability) where it provides an apportionment, one should be made yet only for the period of weeks to which compensation for disability of that 'character' relates."

The significant part of the above quotation is the last four lines, viz.:

"where it provides an apportionment, one should be made yet only for the period of weeks to which compensation for disability of that 'character' relates."

This is nothing less, we respectfully submit, than a statutory interpolation. There is nowhere in the Act any indication that the compensation for permanent partial disability shall be diminished from the periods set forth in the schedules. The Act (Subsection 22) provides only for *increasing* the schedules. Notwithstanding this the court has arbitrarily reduced the schedule compensation from 314 weeks to 280 weeks.

As pointed out above, this was done in order to avoid paying to respondent double compensation for the period during which he was totally disabled; that is, once under subdivision (b) and again under subdivision (c).

If, as the court maintained, Congress intended that respondent should have the two types of compensation, then he should have received double compensation. The fact that the court avoided this result indicates both that it was not Congress' intention to provide for double compensation, nor to give the two types of compensation in the one case.

If it was not the Congressional intent to give an injured employee double compensation (and no one suggests that it was the intent), then it follows that Congress did not intend to give an injured employee two types of compensation for the same injury. To give the two types of compensation for the same injury logically demands the payment of double compensation, unless the anomalous result reached by the court below is substituted for the plain words of the statute.

The true Congressional intent is revealed by comparing with respondent's case the results in cases where the dis-

ability is greater, and cases where the disability is less, than respondent had.

For instance, if respondent had lost his entire arm he would have had a permanent partial disability. The award to him would have been the full schedule loss of 312 weeks provided by subdivision (c) (1) plus the two weeks by which his total temporary disability exceeded the period of 32 weeks. It has never been suggested by anyone that any more than this amount should be given to a man who has completely lost his arm. Indeed, the Federal Compensation Commission, in its opinion on this section of the Act, has stated that that is just what such a man would receive. Opinion #34 of United States Employees' Compensation Commission January 3, 1929 reported in 1929, American Maritime Cases, page 100. This amounts to an admission that only one type of disability is compensable even though both types are present.

Again, assuming that respondent had been totally disabled only 32 weeks instead of 34, there can be no possible dispute that he would not have been entitled to anything other than 40% of 312 weeks under sub-section (c), (1), (19).

The only method by which the words of the statute may be fully respected is on the assumption that Congress intended that an injured man should receive one type of compensation and one only. This is the contention of the petitioner.

For the reasons herein stated, the courts below and the Commissioner erred, and the compensation for the combined injuries should be 125.6 weeks, *i. e.*, 40% of 314 weeks, under Sec. 8 (c), (1), (19) and (22).

POINT TWO.

The question involved is not moot.

It was contended below that since the employer paid the respondent the full amount awarded, the question raised by the employer and the insurance carrier was moot.

The Circuit Court of Appeals decided that the question was not moot. The reason which the court gave was that the insurance carrier, as surety, had a right to have the question finally determined so that its liability to the employer could be fixed.

Regardless of the rights between employer and insurance carrier, it is clear from Sec. 21 (b) of the Act that "any party in interest" has a right to bring the proceeding which was brought by the present petitioners.

Furthermore, it is plainly implied in Sec. 21 (b) that the proceeding may be maintained even though a stay of the payments is denied.

Inasmuch as under Sec. 18 of the Act (U. S. Code, Title 33, Sec. 918) the employer can be compelled to pay the judgment, and inasmuch as a stay is granted only where "irreparable damage" would ensue to the employer, it follows that Congress recognized and provided for the right to a review in proceedings such as the present one, even after the employee was paid.

POINT THREE.

THE DECREE OF THE COURT BELOW SHOULD BE REVERSED.

We respectfully submit that the decree of the court below should be reversed and an award made of 125.6 weeks compensation.

Respectfully submitted,

IRA A. CAMPBELL,
CLETUS KEATING,
VERNON S. JONES,
RAYMOND PARMER,
Counsel for Petitioners.

November 13, 1931.

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Supreme Court
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CHARLES ELMORE

No. 185

In the Supreme Court of the United States

OCTOBER TERM, 1931

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY AND MARYLAND CASUALTY COMPANY, PETITIONERS

v.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT OF THE UNITED STATES, AND EMIL BRUNO GUBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR RESPONDENT AUGUSTUS P. NORTON, DEPUTY COMMISSIONER

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 185

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY and Maryland Casualty Company, petitioners

v.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR the Third Compensation District of the United States, and Emil Bruno Gube

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR RESPONDENT AUGUSTUS P. NORTON, DEPUTY COMMISSIONER

The Government has no interest in the merits of this controversy and therefore does not file a brief in reply to the petition.

The instant proceedings were instituted by a suit in equity brought in the United States District Court for the Eastern District of Pennsylvania under Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927,

c. 509, 44 Stat. 1424, 1436 U. S. C., Sup. IV, Title 33, Sec. 921, to set aside an award made by a Deputy Commissioner of the United States Employees' Compensation Commission on account of an injury sustained by the respondent Gube while working as an employee of the petitioner steamboat company in navigable waters of the United States. Gube fell and sustained an injury to his left arm, which totally disabled him for thirty-four weeks and resulted in permanent disability to the extent of 40% of the use of his left arm. The Commissioner determined that Gube was entitled to receive two-thirds of his average weekly wages for 34 weeks and to receive two-thirds of his average weekly wages for 40% of 280 weeks. The total award was $24.04 a week for 146 weeks.

The dispute concerns the construction of Section 8 of the Act and affects only the amount of compensation to be awarded for an injury which temporarily totally disables the employee and also permanently partially disables him.

The District Court dismissed the bill of complaint, approving the construction adopted by the Deputy Commissioner. The Circuit Court of Appeals had some doubt whether the case was not moot, in view of the fact that the steamboat company had "paid its employee the compensation awarded, as it was bound to do, without awaiting an appeal." (R. 36.) It held, however, that as the insurer was a party and "still desires and has a right to de-

mand that the question of proper payment as affecting its liability to its principal be decided," the court should not dismiss the case as moot. It concluded that the construction adopted by the Deputy Commissioner was correct.

Although the United States Attorney filed a brief in the Circuit Court of Appeals in behalf of the Commissioner, arguing that this construction was correct, we do not conceive that the United States has such an interest in this controversy as to require it to take any position in the case at this time.

We print as an appendix the Act of May 4, 1928, providing for appearance by the District Attorney in cases of this character.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

J. FRANK STALEY,
C. M. HESTER,
WILLIAM H. RILEY, JR.,
Attorneys.

AUGUST, 1931.

APPENDIX

The Act of May 4, 1928, c. 502, 45 Stat. 490 (U. S. C., Sup. IV, Title 33, Sec. 921), reads as follows:

> *Be it enacted* * * * That in any court proceedings under section 21 or other provisions of the Longshoremen's and Harbor Workers' Compensation Act it shall be the duty of the district attorney of the United States in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the United States Employees' Compensation Commission or its deputy commissioner when either is a party to the case or interested, and to represent such commission or deputy in any court in which such case may be carried on appeal.

U. S. GOVERNMENT PRINTING OFFICE: 1931

Supreme Court of the United States

OCTOBER TERM, 1931—No. 185.

BALTIMORE & PHILADELPHIA STEAMBOAT COMPANY and MARYLAND CASUALTY COMPANY,

Petitioners,

vs.

AUGUSTUS P. NORTON, Deputy Commissioner for Third Compensation District of United States,

and

EMIL BRUNO GUBE,

Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR REHEARING.

Baltimore & Philadelphia Steamboat Company, one of the petitioners herein, prays that a rehearing be granted on the matter decided in the opinion of this Court of January 11th, 1932, modifying a decree of the Circuit Court of Appeals of the Third Circuit.

The case was argued on December 11, 1932. The respondents did not appear and the Government declined to argue the merits.

Jurisdiction.

This petition was filed under Section 33 of the Rules of this Court. Power to grant a rehearing is inherent in this Court.

Statutes Involved.

This involves original construction of the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C., s. 908. That section is Sec. 8 of the Act.

Three subdivisions of that section were involved. Roughly, these subdivisions are as follows: subdivision (b), covering the category of *temporary total disability* giving compensation for the complete duration thereof; subdivision (c), covering *permanent partial disability* and giving partial compensation for an arbitrary period—312 weeks in this case.

Paragraph 22 of subdivision (c) covers the *combination* of temporary total disability and permanent partial disability resulting from the same injury and provides a complete measure of compensation within its own words except insofar as it specifically refers to Section (c).

The employee had already received his compensation. This proceeding was brought to review the award.

Question Presented.

The question for decision was the amount of compensation which should have been awarded to an employee who had temporary total disability of 34 weeks, and, in addition thereto, had been left with a 40% permanent disability of his arm.

The Decision.

The Court held that the employee was entitled to the full rate of $24.04 for 32 of the 34 weeks during which he was totally disabled and in addition was entitled to the proportionate rate of $9.616 for 282 weeks. The figure of 282 weeks was arrived at by deducting the 32 weeks of total disability already awarded the full rate from the 312 weeks allowed by statute for the loss of an arm and adding to the result the two weeks of temporary total disability, which had not been awarded the full rate. The proportionate rate, $9.616, was arrived at by taking 40% of the full rate, $24.04.

Stated in terms of rates, the petitioner's contention is that the employee should have received the proportionate rate of $9.616 for the total of 314 weeks. He is not entitled to the full rate for any of the period. The period itself is indivisible.

The petitioner's contention, stated in terms of periods, is that Gube should have received the full rate of $24.04 for 125.6 weeks. This figure is arrived at by taking the 312 weeks expressly allowed for the loss of an arm, adding thereto the 2 weeks allowed for by Sec. 8 (c) (22), making a total of 314 weeks, and taking 40% of that total because Gube had only a 40% loss of use of his arm.

Stated in terms of rates, the difference between this court's decision and the petitioner's contention is that the court has allowed a full rate for 32 of the weeks and the proportionate rate for the balance, whereas the petitioner has allowed the proportionate rate for the entire period.

This court awarded the full rate for 32 weeks, because it said that the statute contemplated that there should

be a separate award for temporary total disability and an additional separate award for permanent partial disability.

The petitioner contended that the proportionate rate should be awarded for the whole number of weeks because the act did not intend to award anything for temporary total disability as such. Instead, the act contemplated that where there was a combination of injuries, the employee should receive only the proportionate rate for the full schedule period. The schedule period has no divisions such as 32 weeks and 280 weeks. It is one integral period.

The question, therefore, was whether Sec. 8 (c) (22) and Sec. 8 (b) are supplemental to each other, as the court found, or whether they are independent of each other as petitioner contends.

Reasons for Granting a Re-hearing.

This petition is in furtherance of the purpose of this court to establish principles for the construction of this act. The present opinion upsets commonly accepted principles and conflicts with the decision of the Court of Appeals of New York. It is contrary to the decision of the Circuit Court of Appeals for the first circuit in *Bethlehem Shipbuilding Corporation, Ltd.* v. *Patrick Monahan* (not yet reported) decided since this case was argued. A copy of this opinion is annexed hereto (pp. 20-23).

Inasmuch as there was no argument for the United States, and inasmuch as the decision of this court went beyond the scope of petitioner's argument, we submit that reargument should be had in order that no doubt may remain as to the advertence of all of the conclusions of the opinion.

Reargument is asked on the following specific grounds:

1. The court has misunderstood the contention of the petitioner.

2. The court has distinguished *Marhoffer* v. *Marhoffer*, 220 N. Y. 543, because of a misunderstanding of that decision and the New York law on which it was based.

3. The court did not appreciate the legislative theory of the New York Act on which the Federal Act was modelled.

4. The decision has left in doubt the proper method of administering the act. It is not known whether commissioners are bound to award proportionate rates for full periods or full rates for proportionate periods.

It is believed that the court has reached its decision by reason of an approach to the question on a theory which was not argued before the court, nor in any of the lower courts. It is believed that if there were a re-hearing it could be shown that the theory adopted by the court is erroneous in view of the history of the compensation legislation. The court's theory is that the Federal Act deals with full periods and proportionate rates but that the New York Act on which the Federal Act was modelled deals with proportionate periods and full rates.

By reason of this theory and the manner in which it was applied, the position of the petitioner has been misunderstood.

1. *The petitioner's position.*

The court said, with respect to the petitioner's contention:

"And they contend that if claimant had not been totally disabled for more than 32 weeks he would not have been entitled to any allowance at the full rate on account of the temporary total disability, but only to the proportionate rate for the entire period, or, according to the method of computation adopted, the full rate for the proportionate number of weeks. And they argue that it is inconsistent to hold that, merely because total disability continued two weeks in excess of the prescribed healing period, claimant was entitled to an allowance at the full rate for the period of total disability."

From this language it is gathered that the court has considered the petitioner's contention as one having to do with whether a proportionate rate or a full rate should be applied in determining the compensation for the period of total disability during the 32 week healing period.

The petitioner's contention was not directed at all to that matter. The petitioner does not attempt to give any compensation for these weeks of total disability as such, either at a full rate or at a proportionate rate. It says that the only weeks considered should be the 312 weeks mentioned as the schedule in subdivision (c). These 312 weeks are not composed of 32 weeks plus 280 weeks. They have nothing to do with the 32 week period. Under the petitioner's construction the 32 weeks are not known or regarded as weeks of total disability and hence are not weeks of the healing period.

It is true that the effect of applying the proportionate rate for a total of 312 weeks can be regarded as compensating the first 32 weeks thereof at the proportionate rate and the remaining 280 also at the proportionate rate. But that is not what was intended. Congress in using 312 weeks as a schedule to determine loss by permanent partial dis-

ability was not referring to loss by total disability and the fact that 32 is less than 312, and *mathematically* included within it, does not mean that the loss by total disability was intended to be included within the schedule loss by permanent partial disability. The section (c) which gives an award of 312 weeks contemplates making no award at all on the basis of total disability. On the contrary it contemplates making awards on the basis of permanent partial disability only, and has no reference to awards made on the basis of total disability. Therefore the assignment of a proportionate rate for the whole period results in an apportionment of (c) only and the total exclusion of (b).

Under petitioner's contention the sole purpose of fixing a healing period was to determine a period in excess of it so that the excess period could be added to the periods in (c). In this case it lengthened the period from 312 to 314 weeks. Fixing a healing period does not mean that the employee is entitled to something more for that period.

When the court states that the petitioner contends that the healing period should receive the proportionate rate, the court assumes that the petitioner means to compensate for that period of total disability as such. Having made that assumption it follows, of course, that petitioner's contention is made to appear as one of compensating for that period at the proportionate rate.

The court apparently thinks that the petitioner has in mind an award of compensation for temporary total disability. The petitioner has no such thought in mind. On the contrary, it has the opposite thought, viz: that no award whatever should be made for total disability when there is a combination of both. The petitioner's contention is that no part of the irreducible 312 weeks represents a period of temporary total disability. Point 3 will show that it is a

substitute intended to give the injured man certain advantages which he would not have otherwise. That is the accepted meaning of the words in the State of New York, where the terms first originated.

2. *The Decision of Marhoffer* vs. *Marhoffer, 220 N. Y. 543, is in Point.*

The Federal Act was patterned after the New York Act. Its language is almost identical. The New York court interpreted it in a definite way in *Marhoffer* v. *Marhoffer* (*supra*). This court has interpreted the Federal Act in an entirely different way.

The court noted in its opinion that the petitioner made no point of whether the rate or the period should be apportioned and noted also that the petitioner had proceeded upon the theory that the period should be apportioned. Although the court said at one place that it made no difference in the result whether the rate or the period were apportioned, yet in distinguishing the case of *Marhoffer* v. *Marhoffer*, the court said:

"That case is not in point. There the controversy concerned the period for which payments were required to be made. Here the question is not whether the healing period shall be added to that allowed on account of partial permanent disability, but it is whether the full rate shall be allowed for the period of total disability up to the specified limit of 32 weeks."

This court has apparently overlooked the fact that in the *Marhoffer* case the court gave what was equivalent to the proportionate rate for the weeks that this court has termed the weeks of the healing period. The New York court, however, like the petitioner here, did not regard the

proportionate payments for those weeks as being intended to compensate for total disability. On the contrary, the weeks were merely mathematically included in the schedule period. Nevertheless, the *Marhoffer* case, if viewed as this court has viewed the Gube case, can be said to be directly in point because the New York court *applied the proportionate rate for the weeks of the healing period.* It is true that the New York court accomplished this by apportioning the entire schedule period and allowing the full rate for the apportioned period. This court itself, however, has pointed out in its opinion, that there is no difference in the result between the method of apportioning the rate on the one hand and the method of apportioning the period on the other.

The *Marhoffer* case can be viewed, either as one in which the period was apportioned and the full rate applied, or it can be viewed, as this court has chosen to regard the problem, viz.: as one in which the rate was apportioned and the full period was applied, which full period included the time of the temporary total disability. It can also be viewed in a third way, the way in which the court intended and the petitioner views it, viz.: as one in which the inclusion of the time of temporary total disability is a mathematical effect and in which the real intention was to compensate for a schedule period without regard to the temporary total disability.

In any event, the *Marhoffer* case is at least authority for the proposition that the act should be viewed as one involving periods and not rates, if that distinction is important.

3. *The Theory of the Federal and New York Acts.*

Irrespective of whether the *Marhoffer* case may be distinguished from the case at bar on the ground mentioned by this court in its opinion, there is this much which can be derived from the *Marhoffer* case as bearing upon the legislative history of the act passed by Congress. That case establishes that the purpose of the legislation was to award an injured man compensation for his disability, *i. e.:* inability to perform labor, and that it was not the purpose of the legislation to give compensation by way of damages for the loss or permanent injury to a leg or an arm. In estimating the amount of such compensation, the legislature provided two measuring rods. The first provided for actually counting the number of weeks that a man was unable to work. The second and alternative method was to fix a definite number of weeks according to a schedule established by the legislature, having some relation, but not an exact one, to the number of weeks during which certain permanent injuries ordinarily would render an injured man unable to work. By neither measuring rod was the injured man to receive compensation for permanent injury as such. The compensation to be given when a man had a permanent injury was either by actually counting the weeks of disablement or by using a schedule which was a legislative appraisement of the disability which certain permanent injuries would normally produce.

Therefore, in the *Marhoffer* case, the Court of Appeals of New York definitely established the rule that an injured man could not have his compensation estimated by the use of two measuring rods, *each of which was designed to measure the same thing.* In other words, there was not to be consecutive or concurrent compensation. Whether stated in rates or periods, the rule is the same.

It was not until 1924 that the Legislature of the State of New York passed Sec. 15(4)(a) which is the same as Sec. 22 (c) of the Congressional Act. When Congress passed its Act in 1927, it used almost the identical language of the New York Act. It is fair to assume, therefore, that Congress intended to pay compensation to injured men on the same basis as that on which it had been paid in New York under and by virtue of the decision in the *Marhoffer* case.

The only point at which this reasoning might be questioned at all is with regard to the effect of the amendment of 1924 to the State act. That amendment is the same as Sec. 8 (c) (22) of the Federal Act. The question is whether the New York Legislature, by fixing a healing period and giving a man compensation for the weeks in excess thereof, intended to change the fundamental purposes of the Act. The New York courts have answered this doubt. They have decided that no change was intended.

Prior to the passage of the Federal Act, it had been definitely held in New York that even after the passage of the State amendment in 1924, the purpose of the Act was still the same as before, and compensation was reckoned the same way. *Labionti* v. *Meehan & Sons,* 215 A. D. 607 (1926).

A later decision confirms the same view. *In the Matter of Joseph Pumalo* v. *Fioto,* 221 A. D. 822 (1927).

In other words, the amendment of 1924 was designed to enlarge the legislative measuring rod (schedules). It did not affect the other measuring rod which estimated the injured man's compensation by actually counting the number of weeks that he was unable to work. Nor did it intend to give him both, or a combination of both.

That was the situation when Congress passed the Federal Act in 1927. The conclusion is inescapable that Congress took the New York Act along with the decisions which interpreted its meaning. Indeed, this can be shown by a reference to Congressional debates. See *Mahony Co.* vs. *Marshall*, 46 F. (2d) 539.

It is important that the Court have in mind that Workmen's Compensation legislation of States other than New York is of a different character and has a different purpose. We refer to the Acts of New Jersey and Massachusetts. In those Acts the purpose is not only to pay the man compensation for the time that he is unable to work, but also to pay him compensation in the nature of an *indemnity* for a permanent injury. In those Acts it is expressly provided that the compensation for the permanent injury shall be added to the compensation for the actual number of weeks that the man is unable to work. As an offset to this arrangement, the schedules in those Acts are much less than the schedules under the New York Act. The loss of an arm, for instance, is 230 weeks in the New Jersey Act, in contrast to the 312 weeks under the New York Act. The difference in the schedules, it is submitted, is due to the different purpose which the legislators had in mind.

In other words, where the purpose is to award an injured man compensation for the actual number of weeks that he is unable to work, plus an indemnity for a permanent injury, the latter amount may be set at one figure. (That is the New Jersey Act.) On the other hand, when the purpose of the legislature is to give only compensation for the number of weeks that a man is unable to work, but determinable by two methods, one by actually count-

ing the number of weeks, and the other by legislative appraisement, then the latter must, in the opinion of the Legislature, have some relation to what a given injury will produce in terms of actual disability. The legislative appraisement of *disability* under the New York Law is, therefore, much greater in number of weeks than the legislative definition of the extent of an *indemnity* for injury under the laws of New Jersey. Therefore, adding an award for permanent disability to an award for temporary total disability, *whether the latter is based upon a proportionate rate or not,* is wholly at variance with the purposes of the New York legislation or any Act patterned upon it.

Congress definitely considered and rejected the New Jersey law. *Mahony* v. *Marshall* (*supra*). Instead, Congress adopted the New York Act. By its decision in this case, this court has imposed upon the petitioners the burden of the heavy schedule losses fixed by the New York legislation, but has deprived the petitioners of the interpretation which made such heavy schedules equitable. It has coupled the feature of two-fold compensation of the New Jersey law with the heavy schedule feature of the New York law. Congress discriminated between the two when it adopted the New York law with its established judicial interpretation.

Viewed in the light of the purpose of the legislation, there are not, nor can there be, any harsh results to an injured man by the adoption of the interpretation of the Federal Act for which the petitioners have contended. In particular, we respectfully submit, the harsh result referred to by the court in the following language does not and cannot happen:

"Petitioners' construction would produce incongruous results in many cases. Indeed a decision cited by them, Texas Employers' Ins. Ass'n *v.* Sheppeard, 32 F. (2d) 300, concretely illustrates such a result. On that basis, whenever the temporary total disability of an arm continued during the full time allowed for healing and the subsequent permanent partial loss of its use was not more than 10 per cent., the injured employe would receive less than if he had suffered only the temporary total disability. Thus petitioners' construction would deny any allowance for the permanent injury. If in this case claimant's permanent partial loss of use of his arm had not been more than 10 per cent., petitioners' calculation would give him compensation for only 31.4 weeks whereas without any permanent disability he would be paid for 32 weeks. Similar inconsistencies arise where an injury of any member listed in the schedule contained in subdivision (c) resulted in temporary total disability followed by relatively small permanent partial loss of its use. It may not reasonably be assumed that Congress intended to require payment of more compensation for a lesser disability than for a greater one including the lesser. Nothing less than compelling language would justify such a construction of the act."

Indeed, as a practical matter, no man can ever receive for his compensation less than the actual number of weeks that he is unable to work.

The situation of a man having 32 weeks total temporary disability and whose compensation is reduced to 31.4 weeks, because he has in addition thereto a permanent partial disability, does not and cannot exist *in fact*. It can exist *in theory* if the problem of his compensation is viewed as one having to do with an estimation of what a theoretically injured man would receive under the Act rather than a problem in accounting as to what a man shall receive (in excess of the payments he has already received for actual

total disability) to compensate him for the residual disability arising from a permanently injured member.

An injured man actually receives compensation in dollars and cents during the period of his total disability. The Act requires that he be paid every two weeks. Sec. 14 (b):

"Sec. 14 (b). The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period."

When his period of actual total disability is ended, then, and then only, can the extent of his permanent partial disability be estimated. But he has already received his payment for his total disability in full and the inquiry then is not whether he shall receive *less* by reason of the existence of a permanent partial disability, but whether he shall receive *more*. If he is to receive more, the inquiry is how much more. *That is the present controversy.* The contention of the petitioners is that, if he is going to receive more compensation after he has already received his compensation for his actual total disability, he can receive it only on the basis of the legislative measuring rod mentioned in Sec. 22 (c), and that that measuring rod is unaffected by the provisions of the measuring rod which envisages simply the actual time that the man was wholly unable to do any work. What he has already actually received for that period cannot be taken away from him. It is simply a debit against the greater amount which is to be awarded by the use of the other measuring rod.

Viewed thus, the provisions of Sec. 22 (c), etc., are a measuring rod by which the injured man can be given additional compensation provided his case is of such a nature as to result in additional compensation by the use of that method of estimating it. If the use of that method does not result in a compensation greater than the amount that the man has already received for his total disability, it is because his amount of permanent partial disability is small or because his total disability does not exceed the healing period, or because of both reasons. Can it be said that having in mind the fundamental purpose of the Act, the result produced is strange and unfair?

If the matter is regarded from the point of view of a theoretically injured man, instead of from that of a man actually injured, the unseemly result pointed out by the Court is no more to be escaped under the rule laid down by the Court than under the rule contended for by the petitioners. We may assume that Gube, instead of being totally disabled for a period of 34 weeks, was disabled for a period of 50 weeks and had only a one per cent permanent disability. If he had just a total disability, he would have received in compensation 50 x $24.04, or $1,202. But by reason of having the one per cent permanent partial disability to his arm, it results from the rule laid down by the Court that he would receive 32 weeks at $24.04 and also 1% of $24.04 x (312 plus 18 — 32), which results in $840.92. This would "require payment of more compensation for a lesser disability than for a greater one including the lesser".

The same result will ensue with a greater percentage of permanent partial disability in every case where the temporary total disability is greater than the 50 weeks assumed here.

Viewed in the light of what would happen to a man actually receiving such an injury, such a result could not and would not occur. The man would receive 50 weeks at the full rate of compensation before any consideration would or could be given as to how much he should receive in addition thereto by reason of his being left with a permanent partial injury. Neither on the Court's interpretation of the Act, nor on that of the petitioners', would he receive anything in addition. The implication of the Court's opinion, however, is that he would not be entitled to the $1,202 which he had actually received.

4. *The Doubt as to Future Procedure.*

There are several additional considerations of which the Court may well take cognizance in determining whether a further hearing should be granted in the matter.

The first is that under the Court's opinion it may be taken that the proper rule is to make an apportionment of the rate rather than an apportionment of the number of weeks. Since compensation under the Act is paid bi-weekly, it results in the payment to an injured man of small and probably inadequate amounts over a long period of time. It may be doubted that Congress intended such a result, for it is injurious to an employee whose compensation is fixed at two-thirds of his weekly wage in the expectation that that will approximate his standard of living and who finds his weekly compensation reduced to a percentage of even that fraction. The petitioner's counsel are advised that the Compensation Commissioner in New York is in doubt whether this Court meant to bring about this incongruous result.

Another consideration is that the Act specifically provides that in no case shall the rate of compensation be less

than $8 per week. Sec. 6 (b). The Court's decision, which seems to mean that the rate is to be apportioned rather than the period, raises the problem as to what would have to be done if the apportionment of the rate should reduce it to an amount less than $8.

It was in view of this latter section that no point was made on the argument as to whether the rate or the period should be apportioned. It was taken for granted that, in accordance with the universal practice of the Compensation Commissioners, and in view of the difficulty which would arise if the apportioned rate should be less than $8, the intention of Congress was to apportion the period rather than the rate.

It is not clear from the Court's opinion whether the interpretation of the Act from the viewpoint of apportionment of rates as opposed to apportionment of periods was meant to be determinative of the result. On the one hand, the Court has apparently reached some important conclusions by applying the rule of apportioning the rates. On the other hand, the Court has said:

"The total of the payments is the same in either case. The computation employed shortens the statutory period and correspondingly increases the weekly payments. Petitioners raise no question as to that feature of the award, and therefore we need not consider whether it is consonant with the act."

Since this matter was not suggested in any of the lower courts and was not considered crucial by the New York courts, the petitioner did not consider it a vital factor in the present case, and did not argue it.

There is also some confusion as to the meaning intended by the Court when it said at one point in its opinion:

"The provisions of (c) (22) have no bearing on the question of whether the full rate or a proportionate one shall be allowed."

and at another point said:

"The language of (22) on which petitioners rely, when taken in context and construed in harmony with the purpose of the act, means that the *full rate* shall be allowed for the duration of the healing time and that the proportionate rate shall apply to the balance of the established compensation period."

It is respectfully submitted that the foregoing considerations merit a re-hearing.

Respectfully submitted,

IRA A. CAMPBELL,
CLETUS KEATING,
VERNON S. JONES,
RAYMOND PARMER,
Counsel for Petitioner, Baltimore & Philadelphia Steamboat Company.

I hereby certify that I have examined the foregoing petition for a re-hearing.

In my opinion it is well founded and entitled to the favorable consideration of the Court. It is presented in good faith and not for the purpose of delay.

VERNON S. JONES.

APPENDIX

(Unofficial Copy.)

UNITED STATES CIRCUIT COURT OF APPEALS

FIRST CIRCUIT.

BETHLEHEM SHIPBUILDING CORPN., LTD.,

vs.

PATRICK J. MONAHAN, Deputy Commissioner, *et al.*

OPINION OF THE COURT, DECEMBER 17, 1931.

BINGHAM, C. J.—This is a suit to set aside for error in law the award of the commissioner under the Longshoremen's & Harbor Workers' Compensation Act (U. S. C., Sec. 901-905), in a case of temporary total disability and permanent partial disability, both resulting from the same injury, consisting of a total loss of hearing in the claimant's right ear.

The commissioner awarded the claimant compensation for 23 weeks and 4 days for total temporary disability from December 28, 1928 to June 9, 1929, inclusive, at the rate of $22.08 per week (66⅔ per centum of $33.12 his average weekly wage); and for 52 weeks for permanent partial disability commencing June 10, 1929, at the rate of $22.08 per week; allowing, however, as a credit thereon $517.30 paid on that account.

The provisions of the act under which the commissioner awarded compensation are found in Sec. 8 (b) and (c) (13), which reads as follows:

SEC. 8. Compensation for disability shall be paid to the employee as follows:

(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, and shall be paid to the employee, as follows:

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.

The single question in this case is whether the claimant is entitled to an award of compensation for a disability resulting from the same injury under the provision of both Sec. 8, subdivision (b) and Sec. 8, subdivision (c). (13). In other words, does the act contemplate and provide for a concurrent or consecutive compensation under these two provisions? The construction of the act in this particular and as an original question may be regarded as doubtful. It certainly presents a close question, but we do not find it necessary to pass upon it as an original proposition for it appears that the provisions of the act here in question (as well as the act itself), were taken verbatim from an act passed by the legislature of New York (N. Y. Cons. Laws, c. 67), which had a well settled construction before their adoption by Congress.

The act, when first enacted in New York, included the provision contained in Sec. 8 of the Federal Act, with the exception of paragraph 22 of subdivision (c). Paragraph (22), however, became a part of and was added to the N. Y. Act in 1924 (N. Y. Cons. Laws 1924, ch. 500); and

in 1927 Congress adopted the provisions of that act as amended in 1924, which is the act now under consideration.

In 1917, the Court of Appeals of the State of New York in the case of Marhoffer *v.* Marhoffer, 220 N. Y. 543; 116 S. E. 379, had under consideration the construction and meaning of the corresponding provision of Sec. 8 (b) and (c). At that time, it is to be remembered, the New York Act did not contain the additional provision embodied in Sec. 8 (c) 22. In construing the corresponding provisions of Sec. 8 (b) and (c), in a case that involved the loss of an arm, it was held that the claimant was not entitled to concurrent or consecutive compensation under subdivisions (b) and (c) for temporary total disability and permanent partial disability; and compensation for permanent partial disability only was awarded.

And in 1926, after the adoption of the additional provision in c-22, the Appellate Division of the Supreme Court of New York on March 3, 1926, in Labionti *v.* John Meehan & Sons, 215 A. D. 607; 214 N. Y. S. 442, reaffirmed the doctrine of the Marhoffer case holding that a claimant was not entitled to concurrent or consecutive compensation under the corresponding provision of Sec. 8 (b) and (c).

Since the adoption of the New York Act by Congress the New York courts have held to the same construction of its act, Hoffman *v.* Chatham Elec. Lt. & Power Co., 224 A. D. 799, 230 N. Y. S. 849; Gefers *v.* N. Y. Window Cleaning Co., 224 A. D. 792; Rubenstein *vs.* Pechter Baking Co., 224 A. D. 324; 230 N. Y. S. 577, all three of which cases were affirmed by the Court of Appeals in 249 N. Y. 433, 164 N. E. 341.

Such being the settled construction of these provisions of the New York Act at the time of its adoption in 1927,

it is to be presumed that Congress intended that such provisions should be understood and applied in accordance with that construction. In other words, that it adopted the act with the construction placed upon it by the New York courts. Capital Traction Co. *v.* Hof, 174 U. S. 1, 36; Henrietta Mining & Milling Co. *v.* Gardner, 173 U. S. 123, 130; Texas Employers Ins. Assn. *v.* Sheppeard, 32 F. (2d) 300; Cunningham *v.* Commr. of Banks, 249 Mass. 401, 423; Cyc. 1154 Note 81 and cases there cited.

The decree of the District Court dismissing the bill is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

District Court's opinion reported at 50 F. (2d) 457.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 185.

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY
and
MARYLAND CASUALTY COMPANY,
Petitioners,
vs.
AUGUSTUS P. NORTON, Deputy Commissioner for Third Compensation District of United States,
and
EMIL BRUNO GUBE,
Respondents.

PETITION OF THE MARYLAND CASUALTY CO. FOR A REHEARING

EDWIN A. SWINGLE,
Counsel for Petitioner.

J. D. MILAM & SONS, 707 EIGHTH ST. N. W., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 185.

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY

and

MARYLAND CASUALTY COMPANY,
Petitioners,

vs.

AUGUSTUS P. NORTON, Deputy Commissioner for Third Compensation District of United States,

and

EMIL BRUNO GUBE,
Respondents.

PETITION FOR REHEARING.

Comes now the above-named Maryland Casualty Company, and presents this its Petition for a Rehearing of the above-entitled cause, and in support thereof respectfully shows:

1. The Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., Secs. 901-908), including Section 8, here involved, was a substantial verbatim adoption by the Congress of the United States of the Compensation Act then in force in the State of New York.

2. When Congress adopted this State legislation, it must be presumed to have adopted it as it was then understood and applied in the State of New York.

3. At the time of, as well as prior and subsequent to, its adoption by Congress, the New York Act was consistently construed, understood and applied in the State of New York as prohibiting the allowance of concurrent or consecutive compensation awards, that is to say: awards for temporary total disability in addition to awards for permanent partial disability, irrespective of whether the permanent partial disability consisted of a total or partial loss of or loss of the use of a member.

4. The Longshoremen's Act has consistently been construed by the Federal Courts throughout the United States as not allowing concurrent or consecutive awards.

5. Nowhere does the Act expressly provide for such cumulative awards or payments, either concurrently or consecutively.

6. But there is nothing in the Act which would prevent an injured employee from electing to claim compensation for his temporary total disability rather than his permanent partial disability in a case where an allowance for temporary total disability would exceed an allowance for permanent partial disability.

7. If Congress had intended to require the payment of concurrent or consecutive awards, it is to be pre-

sumed that it would have said so. Certain State Compensation Acts did, at the time Congress adopted this legislation, expressly so provide. This, therefore, was a matter of legislative policy. And, while the Act may be deemed to be in the public interest, yet it undoubtedly is also in derogation of common law, and does away with certain well established common law defenses such as the fellow servant doctrine, and the doctrines of assumed risks and contributory negligence; and in addition thereto creates liabilities and imposes upon employers duties and obligations unknown to the common law, and requires payments to be made irrespective of any negligence on the part of the employer.

For the foregoing reasons it is respectfully urged that this Petition for a Rehearing be granted, and that the judgment or decree of the United States Circuit Court of Appeals for the Third Circuit be, upon further consideration, reversed.

Respectfully submitted,

EDWIN A. SWINGLE,
Counsel for the Maryland
Casualty Company, Petitioner.

Certificate of Counsel.

I, Edwin A. Swingle, counsel for the above-named Maryland Casualty Company, Petitioner, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

EDWIN A. SWINGLE,
Counsel for the Maryland
Casualty Company, Petitioner.

BRIEF IN SUPPORT OF PETITION.

Federal Adoption of State Legislation.

1. On March 4th, 1927, Congress passed the Longshoremen's and Harbor Workers' Compensation Act, which was an adoption and practically a verbatim copy of the Compensation Act then in force in the State of New York. This is not, and cannot be, disputed, and not only can be demonstrated by a comparison of the two Acts, but has actually been recognized by the Federal Courts.

In *Bethlehem Shipbuilding Corporation vs. Monahan*, 50 Fed. (2d) 457, in speaking of the Longshoremen's Act, the Court said: "I am aware that this statute was copied from the New York statute."

And the Circuit Court of Appeals for the First Circuit, in its very recent opinion in this same case, ... Fed. (2d) ..... (decided December 17th, 1931), says: "The provisions of the Act here in question (as well as the Act itself) were taken verbatim from an Act passed by the Legislature of New York."

See also *Texas Employers' Insurance Association vs. Sheppeard*, 32 Fed. (2d) 300.

2. In thus adopting the Compensation Act of New York State, Congress must be presumed to have adopted said jurisprudence as it was then understood and applied in the State of New York.

In *Metropolitan R. R. Co. vs. Moore*, 121 U. S. 558, 30 L. Ed. 1022, this Court said:

> "The sections of the Revised Statutes relating to the District of Columbia under consideration, it is admitted, were taken substantially from the New York Code of Procedure of 1851, 1852; and it is admitted, also, that, by the construction

placed upon the language contained in section 804 by the courts of New York, it includes motions to set aside a verdict against the weight of evidence, as within the phrase 'for insufficient evidence.' This was the very point determined in the case just referred to, of Algeo vs. Duncan, 39 N. Y. 313, and in McDonald vs. Walter, 40 N. Y. 551. The Supreme Court of the District of Columbia, however, in Stewart vs. Elliott, ubi supra, declined to follow these decisions of the New York Courts, because they construed the Code of Procedure of that State so as to conform to the previous well established practice in that State; and it was held that in the District of Columbia the case was widely different, because prior to the adoption of these provisions in the Act of Congress the well established practice in the District of Columbia was that which had always been in force in the State of Maryland. * * *

"Instead of construing these new statutory provisions in the light of the jurisprudence of Maryland previously prevailing in the District in reference to this subject, we think that when Congress reorganized the judicial system of the District, by abolishing the old courts and by establishing the present Supreme Court of the District, with its General and Special Terms, and adopted them from the legislation of New York in substantially the same language, these provisions are to be construed in the sense in which they were understood at the time in that system from which they were taken. In other words, we think that Congress adopted for this purpose the law of New York as it was understood in New York. McDonald vs. Hovey, 110 U. S. 619 (28:269)."

See also, to the same effect, *Brown vs. Walker*, 161 U. S. 591; *Capital Traction Company vs. Hof*, 174 U. S. 1, 43 L. Ed. 873; *Henrietta Mining Co. vs. Gardner*, 173

U. S. 123, 130; *Texas Employers' Insurance Association vs. Sheppeard*, 32 Fed. (2d) 300; *Cunningham vs. Commissioner of Banks*, 249 Mass. 401, 423; *Bethlehem Shipbuilding Corporation vs. Monahan* (C. C. A.), ... Fed. (2d) ..... (hereinafter quoted); 36 Cyc. 1154, Note 81, and cases there cited.

Construction of New York Act When Adopted by Congress.

3. The Courts of New York, at, prior and subsequent to the time of the adoption by Congress of the Longshoremen's Act, consistently held and interpreted the New York Compensation Act as denying to an injured employee payment for both temporary total and permanent partial disability, and this, irrespective of whether the permanent partial disability consisted of a total or proportionate loss of, or loss of use of, a member.

Apparently the earliest case on this subject decided by the New York Courts is Fredenburg vs. Empire United Rys., 154 N. Y. S. 351, decided July 1st, 1915, wherein the employee sustained injuries resulting in the amputation of one foot and other injuries not shown to be permanent. The Commission made an award for permanent partial disability, and in addition an award for temporary total disability. The Court held that this was not in accordance with law, and said:

> "Making the second award was, we think, plainly contrary to the intent of the Compensation Law. * * * There is nothing to be found in the Act justifying the allowance of concurring compensation for temporary total disability when the employee is already receiving a weekly

compenstaion of two-thirds of his average weekly wages, or full compensation for total disability. The Act provides but the single rate of compensation, to-wit, 66 2/3 per centum of the employee's average weekly wages; and this percentage for a longer or shorter period is applicable to all disabilities, whether total or partial, and is the maximum compensation provided for by the statute. The Act was not intended as a source of profit to the employee, or as a means of punishment of the employer, who, in many cases, is wholly free from any fault in connection with the accident. If concurring awards may be allowed, it is easy to see how that practice may be carried to such an extent as to become very burdensome and unjust to the employer and very unfortunate to an improvident employee, and to a considerable extent render nugatory the beneficent purpose of the statute."

Then came the case of *Marhoffer vs. Marhoffer*, 220 N. Y. 543, 116 N. E. 379, decided by the Court of Appeals of New York on May 1st, 1917. In that case the employee suffered a total loss of his second finger, which constituted a permanent partial disability, and also sustained severe lacerations to his thumb and index finger, which, it was claimed, constituted temporary total disability. The question in that case was whether consecutive compensation, first, during temporary disability, and thereafter, for permanent partial disability, could be allowed. The Court, in a detailed opinion, held that inasmuch as the legislature had not seen fit to provide in the Act for concurrent or consecutive compensation, this could not be done, and said that: "The order of the Appellate Division affirming the award for 8 weeks' temporary total disability should be reversed." And while it is true, as pointed out by this Honorable Court in its opinion in the pres-

ent case, that the Marhoffer case might be considered as a case involving permanent partial loss, consisting of the total loss of a member, which circumstances admittedly would preclude an additional recovery for temporary total disability, yet the opinion in the Marhoffer case does not show that the Court decided that case on this theory, but rather that the Court decided the case on the sole theory that the New York Act did not allow compensation for both types of disability. The New York Courts undoubtedly understood the Marhoffer opinion to mean this because in cases decided subsequent to the Marhoffer case involving instances where the permanent partial disability did not consist of the total loss of a member but only a proportionate part of a member, nevertheless followed, and frequently cited and quoted the Marhoffer case for their authority.

This is clearly demonstrated in the case of *Labionti vs. John Meehan & Sons,* 215 App. Div. (N. Y.) 607, decided March 3rd, 1926, and prior to the adoption by Congress of the New York Act, in which case the claimant sustained a temporary total disability and a permanent partial disability, consisting of the loss of only a part of his great toe. The Court there held that the claimant could not recover anything for his temporary total disability.

In *Hinly vs. Brooklyn Heights R. Co.,* 215 App. Div. 857; 213 N. Y. S. 321, decided January 15th, 1926, the employee sustained the loss of her left leg and a temporary disability to her right leg. The Court held that she was not entitled to compensation for the temporary disability to her right leg, and said:

> "Award reversed and claim dismissed, with costs against the State Industrial Board, on the

ground that the injury to the claimant's right leg was not proven or found to be other than a temporary disability; that this disability was present during the period when claimant was being paid compensation for the loss of her left leg; that an award for the right leg cannot be appended to an award for the left leg, the former to begin when the latter ended; that the two injuries constituted but one disability to work; that the award for the left leg was more than $3,500; that the sum so awarded and paid must be considered in connection with the injury to the right leg; that, so considered, the claimant may not receive further compensation on account of such temporary disability; that the case of Marhoffer vs. Marhoffer, 220 N. Y. 543, 116 N. E. 379, precludes the claimant from receiving compensation for the injury to her left leg."

On September 20th, 1928, the Appellate Division of the Supreme Court of New York decided the three cases of *Rubenstein vs. Pechter Baking Co.*, 230 N. Y. S. 577; *Gefers vs. New York Window Cleaning Co.*, 230 N. Y. S. 706; and *Hoffman vs. Chatham Electric Light, Heat and Power Co.*, 230 N. Y. S. 849.

In the *Rubenstein* case, the appeal was from an award for the total loss of use of the left eye, which was in addition to a previous schedule award for the loss of use of one-half of the hand. The question was whether one schedule award for the loss of use of a member may be made to begin at the conclusion of another schedule award for the loss or partial loss of use of another member. The Appellate Division said that "a schedule award for temporary partial disability may not be appended to an award for temporary total disability, so that compensation for the former

begins to run at the end of the period covered by the latter"; citing and quoting from the Marhoffer case.

In the *Gefers* case, the Board made three schedule awards to run consecutively for multiple injuries.

And, in the *Hoffman* case, an award was made for the permanent loss of use of 40 per cent of the right hand, and also 35 per cent loss of use of the left hand, to be paid consecutively.

The Appellate Division held, in all three of these cases, that concurrent or consecutive awards cannot be made under the New York Act. Later these three cases were appealed, and thereafter decided in *Hoffman vs. Chatham Electric Light, Heat and Power Co.*, 249 N. Y. 433, on December 4th, 1928, in a per curiam opinion which said that "Under our ruling in Matter of Marhoffer vs. Marhoffer (220 N. Y. 543), awards for injuries may not properly be consecutive."

In fact, so well settled had this jurisprudence been established in the State of New York that in the case of *Eppenstein vs. Adams & Co.*, 230 N. Y. S. 714, decided September 20th, 1928, and affirmed in 250 N. Y. 562, where the employee sustained a 25 per cent permanent loss of use of the foot and leg, and at the same time suffered 28 weeks' temporary total disability, neither side even contended that temporary total disability could be granted in addition to permanent partial disability, nor did the Court allow claimant anything for the schedule healing period, but only for the excess.

To further illustrate the fact that this interpretation had become well settled, the New York State Department of Labor, in its Special Bulletin No. 161, issued in August, 1929, which is the official publication of the Industrial Board which administers the New York Act, at page 103 recognizes, in applying Subdivision 4-a of

Sec. 15 of the New York Act, which is the same as Sec. 908 (c) (22) of the Longshoremen's Act here under discussion, no distinction between total loss and partial loss of a member, and does not allow an award for temporary total disability to be made in addition to an award for permanent partial disability.

Construction by Federal Courts.

4. The Federal Courts throughout the United States have consistently followed the New York decisions in holding that concurrent or consecutive awards are not allowed by the Longshoremen's Act.

The latest of these cases is that of *Bethlehem Shipbuilding Corporation vs. Monahan, supra,* decided by the United States Circuit Court of Appeals, for the First Circuit, No. 2601—October Term, 1931, on December 17th, 1931 (not yet printed), six days after the argument before this Honorable Court of the case at bar, for which reason it was obviously impossible for Petitioner to bring the same to the attention of this Court. We quote, however, below, this opinion in full:

> "This is a suit to set aside for error in law the award of the commissioner under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. Secs. 901-905) in a case of temporary total disability and permanent partial disability, both resulting from the same injury, consisting of a total loss of hearing in the claimant's right ear.
>
> "The commissioner awarded the claimant compensation for twenty-three weeks and four days for total temporary disability from December 28, 1928, to June 9, 1929, inclusive, at the rate of $22.08 per week (66 2/3 per centum of $33.12, his average weekly wage); and for

fifty-two weeks for permanent partial disability commencing June 10, 1929, at the rate of $22.08 per week; allowing, however, as a credit thereon, $517.30 paid on that account.

"The provisions of the Act under which the commissioner awarded compensation are found in Sec. 8 (b) and (c) (13), which read as follows:

'Sec. 8. Compensation for disability shall be paid to the employee as follows:

(b) Temporary total disability: In case of disability total in character but temporary in quality, 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, and shall be paid to the employee, as follows:

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.'

"The single question in this case is whether the claimant is entitled to an award of compensation, for a disability resulting from the same injury, under the provisions of both Sec. 8 (b) and Sec. 8 (c) (13). In other words, does the Act contemplate and provide for concurrent or consecutive compensation under these two provisions? The construction of the Act in this particular and as an original question may be regarded as doubtful. It certainly presents a close question. But we do not find it necessary to pass upon it as an original proposition for it appears that the provisions of the Act here in question (as well as the Act itself) were taken

verbatim from an Act passed by the Legislature of New York (N. Y. Consolidated Laws, Chap. 67), which had a well settled construction before their adoption by Congress.

"The Act, when first enacted in New York, included the provisions contained in Sec. 8 of the Federal Act, with the exception of paragraph (22) of subdivision (c). Paragraph (22), however, became a part of and was added to the New York Act in 1924 (N. Y. Laws, 1924, Chap. 500); and in 1927 Congress adopted the provisions of that Act as amended in 1924, which is the Act now under consideration.

"In 1917 the Court of Appeals of the State of New York, in the case of Marhoffer vs. Marhoffer, 220 N. Y. 543; 116 N. E. 379, had under consideration the construction and meaning of the corresponding provisions of Sec. 8 (b) and (c). At that time, it is to be remembered, the New York Act did not contain the additional provisions embodied in Sec. 8 (c) (22). In construing the corresponding provisions of Sec. 8 (b) and (c), in a case that involved the loss of an arm, it was held that the claimant was not entitled to concurrent or consecutive compensation under subdivisions (b) and (c) for temporary total disability and permanent partial disability; and compensation for permanent partial disability only was awarded.

"And in 1926, after the adoption of the additional provisions in (c), paragraph (22), the Appellate Division of the Supreme Court of New York, on March 3, 1926, in Labionti vs. John Meehan & Sons, 215 App. Div. 607; 214 N. Y. Supp. 442, reaffirmed the doctrine of the Marhoffer case, holding that a claimant was not entitled to concurrent or consecutive compensation under the corresponding provisions of

"Since the adoption of the New York Act by Congress, the New York courts have held to the same construction of its Act. Hoffman vs. Chatham Electric Light, Heat & Power Co., 224 App. Div. 799; 230 N. Y. Supp. 849; Gefers vs. N. Y. Window Cleaning Co., 224 App. Div. 792; Rubenstein vs. Pechter Baking Company, 224 App. Div. 324; 230 N. Y. Supp. 577,—all three of which cases were affirmed by the Court of Appeals in 249 N. Y. 433; 164 N. E. 341.

"Such being the settled construction of these provisions of the New York Act at the time of its adoption in 1927, it is to be presumed that Congress intended that such provisions should be understood and applied in accordance with that construction. In other words, that it adopted the Act with the construction placed upon it by the New York courts. Capital Traction Co. vs. Hof., 174 U. S. 1, 36; Henrietta Mining Co. vs. Gardner, 173 U. S. 123, 130; Texas Employers' Insurance Ass'n vs. Sheppeard, 32 Fed. (2d) 300; Cunningham vs. Commissioner of Banks, 249 Mass. 401, 423; 36 Cyc. 1154, note 81, and cases there cited.

"The decree of the District Court dismissing the bill is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion."

To the same effect is the case of *Grays Harbor Stevedore Company vs. Marshall*, 36 Fed. (2d) 814; and *Texas Employers' Insurance Association vs. Sheppeard*, 32 Fed. (2d) 300; both of which cases involved temporary total disability followed by permanent partial disability, consisting of a proportionate loss, or loss of use, of a member, rather than a total loss, or loss of use of, a member.

In addition to the Federal Courts, many State Courts have decided that concurrent or consecutive awards

for temporary total disability, in addition to permanent partial disability, cannot be allowed. See

Boune vs. Rolling Mills Co., 95 Conn. 295;
Amer. Mut. Liab. Ins. Co. vs. Braden (Ga. App.) 157 S. E. 904;
Hardin vs. Higgins Oil and Fuel Co., 147 La. ....., 85 S. 202;
Reay vs. Elmira Coal Co. (Mo. App.), 34 S. W. (2d) 1015 (under statute);
Spring Canyon Coal Co. vs. Industrial Commission, 57 Utah 208;
Marsh vs. Aljoe, 41 Wyo. 220;
Fid. Union Casualty Company vs. Munday (Texas), 26 S. W. (2d) 676;
Johnson vs. Cole (Ind. App.), 161 N. E. 700.

Act Does Not Expressly Provide for Cumulative Awards.

5. That the Longshoremen's Act does not expressly provide for cumulative awards, payable either concurrently or consecutively, is obvious from a reading thereof, and as is said in the Marhoffer case, *supra*, "The law is silent on the subject."

Election by Employee.

6. However, there is nothing in the Act which would prevent an injured employee from electing to claim compensation for his temporary total disability rather than for his permanent partial disability, where it would be to his advantage so to do, as, for instance, in any case where an allowance for temporary total disability would exceed an allowance for permanent partial disability where the percentage of permanent partial disability was small. In the opinion of Judge

Woolley in the Circuit Court of Appeals, in the case at bar, 48 Fed. (2d) 57, he says:

> "Some authorities interpret a similar state statute (meaning evidently the New York Act) on the theory that although a man may suffer two kinds of injury from the same accident, he can not claim compensation for both temporary total disability and permanent partial disability *but must elect* the compensation payable for one or the other as suits him best."

This principle is also recognized in *Texas Employers' Insurance Association vs. Sheppeard, supra,* where the Court says that an injured employee "may claim either temporary total or permanent partial as suits him best, but cannot claim both."

Legislative Policy.

7. Whether or not concurrent or consecutive awards should be allowed is a matter of legislative policy. Apparently Congress did not deem it wise to provide for such double awards. It may have thought that inasmuch as the legislation itself, though in public interest, yet also in derogation of common law, creates additional liabilities, and imposes upon employers duties and obligations unknown to the common law, irrespective of any negligence on their part, and eliminates such common law defenses as the fellow servant doctrine and the doctrines of assumed risks and contributory negligence, were such a burden directly upon the employers and indirectly upon the consuming public, that a fair exchange for these ought not to require a double payment in any sense to the employee. The Compensation Acts of various states other than New

York at the time Congress adopted this legislation did expressly so provide; but Congress did not see fit to adopt the Compensation Act of any such state, nor in adopting to change the New York State Act in that regard. It cannot, therefore, be easily presumed that Congress meant to impose this double liability. As is stated in the *Marhoffer* case, *supra:*

> "The entire matter is committed to the legislative discretion (Shanahan vs. Monarch Engineering Co., 219 N. Y. 469, 114 N. E. 795), which has not seen fit to provide for concurrent (Matter of Fredenberg vs. Empire U. Rys., Inc., 168 App. Div. 618, 154 N. Y. Supp. 351) or consecutive compensation. If the act is not sufficiently broad, in view of the fact that it covers negligent as well as non-negligent injuries, we may not disregard its provisions to deal more scientifically or justly with the subject."

And in the *Sheppeard* case, *supra,* the Court said:

> "If Congress, which has adopted the New York Act and the construction which the New York courts have put upon it, desires to change the statute so as to avoid either the language or the construction placed upon it by the New York courts, it may do so, but until it does so the Commissioner must administer the Act as it is written, and as it has been interpreted, and not under an arbitrary rule conceived by it to be more beneficial than the one prescribed by statute."

Dependent Litigation.

There are now pending for argument and decision in the Court of Appeals of the District of Columbia at least four suits, the question in each of which is whether or not concurrent or consecutive compensa-

tion awards are payable under the Workmen's Compensation Act for the District of Columbia, which is an adoption in *haec verba* by Congress of the Longshoremen's Act under discussion in the present case. In addition to this, there are at least six other cases in the Supreme Court of the District of Columbia involving the same question, all of which have been appealed to the Court of Appeals of the District of Columbia, but are now being held in *status quo* on stipulations, pending a decision of the question involved. Inasmuch as the questions raised by the foregoing Petition for Rehearing are not finally disposed of in the opinion heretofore rendered by this Honorable Court in this case, it is respectfully suggested and urged that the matter be now settled by this Honorable Court; otherwise, it will obviously become necessary to hereafter request this Honorable Court to grant a Writ of Certiorari in the above-mentioned litigation for the purpose of settling the question involved.

The litigation above referred to, now pending in the Court of Appeals of the District of Columbia, consists of the case of Metropolitan Life Insurance Company and The Travelers Insurance Company, Appellants, vs. Robert J. Hoage, Deputy Commissioner, etc., and Oscar M. Harkness, Appellees, October Term, 1931, No. 5532, in which the actual healing period was in excess of the schedule healing period; and the three following cases in which the actual healing period was less than the schedule healing period, namely:

Robert J. Hoage, Deputy Commissioner, etc., Appellant, vs. Andres Stone and Marble Company, a Corporation, and Massachusetts Bonding and Insurance Company, Appellees, October Term, 1931, No. 5522.

Robert J. Hoage, Deputy Commissioner, etc., Appellant, vs. Sterling Laundry Company, Inc., and. Phoenix Indemnity Company, Appellees, October Term, 1931, No. 5523.

Robert J. Hoage, Deputy Commissioner, etc., Appellant, vs. Chas. H. Tompkins Company and The Travelers Insurance Company, October Term, 1931, No. 5524.

Undoubtedly there is also now pending similar litigation in the various United States District Courts throughout the country, involving the same question, which question we submit is one of major importance to the employees, the employers (some of whom are self-insurers), and the insurance companies. It has been made known to counsel that in addition to the companies involved in the above-mentioned litigation, the following compensation insurance carriers consider this question of major importance, and desire this Honorable Court to grant the rehearing requested and to now pass upon the question, namely:

General Accident, Fire, and Life Assurance Corporation, Ltd.

Commercial Casualty Insurance Company

Century Indemnity Company

The Employers' Liability Assurance Corporation of London, Ltd.

London Guarantee & Accident Company, Ltd.

Conclusion.

For the reasons above given, and inasmuch as the opinion of this Honorable Court in this case does not dispose of the questions hereinabove raised, it is respectfully urged that a rehearing should be granted, and the judgment or decree below be reversed.

Respectfully submitted,

EDWIN A. SWINGLE,
Counsel for the Maryland Casualty Company, Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 185.—October Term, 1931.

Baltimore and Philadelphia Steamboat Company and Maryland Casualty Company, Petitioners, vs. Augustus P. Norton, Deputy Commissioner for Third Compensation District of United States, and Emil Bruno Gube.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 11, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

This is a suit in equity brought by petitioners in the District Court for the Eastern District of Pennsylvania to set aside as not in accordance with law an order of the deputy commissioner awarding compensation to Gube under the Longshoremen's and Harbor Workers' Act of March 4, 1927, 44 Stat. 1427, 33 U. S. C., § 900 *et seq.* The District Court dismissed the cause, 40 F. (2d) 530, and the Circuit Court of Appeals affirmed. 48 F. (2d) 57.

February 17, 1928, Gube, while engaged in work for the steamboat company as a longshoreman upon a vessel in the navigable waters of the United States, suffered an injury to his left arm. He filed with the deputy commissioner a claim against the employer and insurer for compensation in accordance with the Act. The deputy commissioner found that claimant's average weekly wage amounted to $36.06; that as a result of the injury he suffered total disability for 34 weeks following and permanent partial impairment, amounting to 40 per cent of the use of his arm and awarded compensation at the weekly rate of $24.04 for 146 weeks, amounting in all to $3,509.84.

Petitioners maintain that the award should be the full rate for 40 per cent of 314, being 125.6 weeks, and that the amount allowed below is excessive by 20.4 weeks or $490.42. We are called

on to determine, on the basis of the facts found, what amount the Act requires the employer to pay claimant. No other question is presented.

The pertinent provisions follow:

"Sec. 8. Compensation for disability shall be paid to the employee as follows: . . .

"(a) In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. . . .

"(b) In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

"(c) In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, and shall be paid to the employee, as follows:

"(1) Arm lost, three hundred and twelve weeks' compensation. . . .

"(18) Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

"(19) Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member. . . .

"(22) In case of temporary total disability and permanent partial disability, both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision (c) of this section: Arm, thirty-two weeks; . . .

In any case resulting in loss or partial loss of use of arm . . . where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision (c) . . . ."

The award is based on a construction of the section in substance as follows: Subdivision (b) allows compensation for temporary total disability during its continuance at the rate of two-thirds of the average weekly wage. Subdivision (c) allows for permanent partial loss of use of an arm compensation for 314 weeks at a rate that is the same proportion of two-thirds of the weekly wage as such partial disability is of the total use. (1), (18), (19), (22). Temporary total disability and permanent partial disability resulted from the same

injury. The former continued 34 weeks, being two weeks in excess of the healing period allowed by c (22). The computation was: $36.06 \times \frac{2}{3} = \$24.04 \times 34 = \$817.36$ for temporary total disability of claimant. $312 + 2 = 314 - 34 = 280 \times \$24.04 \times .40 = \$2,692.48$ for permanent partial disability of his arm.

The allowance for temporary total disability was for its duration, 34 weeks. That is not authorized. The period of allowance is definitely limited to 32 weeks, and the statute expressly authorizes enlargement of the specified compensation period, 312 weeks, by the excess of actual temporary total disability over the time limited for healing, and so here the added two weeks take the proportionate rate. (c) (1) (22).

The deputy commissioner did not apply the proportionate rate, $9.616, to the 280 weeks remaining but added to the 34 weeks 40 per cent of 280 (being 112) and applied the full rate for 146 weeks. The total of the payments is the same in either case. The computation employed shortens the statutory period and correspondingly increases the weekly payments. Petitioners raise no question as to that feature of the award, and therefore we need not consider whether it is consonant with the Act.

In support of their computation, petitioners call attention to the second paragraph of (c) (22), that in any case resulting in the loss or partial loss of the use of an arm, or other specified member, where the temporary total disability does not extend beyond the periods for which payments are required, compensation shall be limited to the schedule, (1) to (13), contained in subdivision (c). And they contend that if claimant had not been totally disabled for more than 32 weeks he would not have been entitled to any allowance at the full rate on account of the temporary total disability but only to the proportionate rate for the entire period, or, according to the method of computation adopted, the full rate for the proportionate number of weeks. And they argue that it is inconsistent to hold that, merely because total disability continued two weeks in excess of the prescribed healing period, claimant was entitled to an allowance at the full rate for the period of total disability.

Petitioners' construction would produce incongruous results in many cases. Indeed a decision cited by them, *Texas Employers' Ins. Ass'n* v. *Sheppeard*, 32 F. (2d) 300, concretely illustrates

such a result. On that basis, whenever the temporary total disability of an arm continued during the full time allowed for healing and the subsequent permanent partial loss of its use was not more than ten per cent, the injured employee would receive less than if he had suffered only the temporary total disability. Thus petitioners' construction would deny any allowance for the permanent injury. If in this case claimant's permanent partial loss of use of his arm had not been more than ten per cent, petitioners' calculation would give him compensation for only 31.4 weeks whereas without any permanent disability he would be paid for 32 weeks. Similar inconsistencies would arise where an injury of any member listed in the schedule contained in subdivision (c) resulted in temporary total disability followed by relatively small permanent partial loss of its use. It may not reasonably be assumed that Congress intended to require payment of more compensation for a lesser disability than for a greater one including the lesser. Nothing less than compelling language would justify such a construction of the Act.

Petitioners also cite *Marhoffer* v. *Marhoffer*, 220 N. Y. 543, reversing 175 App. Div. 52. That case arose under the state workmen's compensation law. Claimant suffered an injury to his hand including lacerations of his thumb and index and loss of the middle finger. The statute limited the temporary total to 12 and the permanent partial disability allowance to 30 weeks. It required the payment of the full rate of two-thirds of the weekly wage on account of the total disability and the same rate during the compensation period established for the loss of a finger. The commission found total disability continued ten weeks and, as the statute provided, excluded the first two and allowed the full rate for eight weeks; it also allowed the full rate for the permanent partial disability for 30 weeks, to commence at the expiration of the eight weeks period, and so the full rate was allowed for 38 weeks. The appellate division sustained the award but that judgment was reversed. The Court of Appeals held it error to make consecutive allowances, first for the temporary total disability and second on account of the loss of the finger for the full period, and directed that the claim for the first be dismissed. Obviously the loss of the finger together with the other lacerations caused temporary total disability. That period was attributable

to the injury as a whole and not exclusively to the lacerations. And while the total disability continued it necessarily included the impairment of use that was permanently to remain. That case is not in point. There the controversy concerned the period for which payments were required to be made. Here the question is not whether the healing period shall be added to that allowed on account of partial permanent disability, but it is whether the full rate shall be allowed for the period of total disability up to the specified limit of 32 weeks.

The measure before us, like recent similar legislation in many States, requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results. *Jamison* v. *Encarnacion*, 281 U. S. 635, 640.

Section 8 establishes the rule that the full rate shall apply during continuance of total disability whether permanent or temporary, (a) and (b), and during the specified compensation period for partial permanent disability due to loss of a listed member, (c) (1) to (13) inclusive, and it specifically provides: "Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member". The provisions of (c) (22) have no bearing on the question whether the full rate or a proportionate one shall be allowed. They relate to the periods during which payments are to be made when temporary total disability and permanent partial disability result from the same injury and establish the rule that, if temporary total disability continues for more than the prescribed healing period, the excess shall be added to the total compensation period specified in the schedule in subdivision (c), and that if actual duration of the temporary total disability does not exceed such healing time then the applicable period specified in such schedule shall not be increased.

It is clear, when the related parts of § 8 are considered together, that Congress intended to distinguish between temporary total disability (b), permanent partial disability due to the total loss of the use of a member (c) (1), and permanent partial disability due to the partial loss of such use (c) (18) (19), and that its purpose was to require payments on account of the loss of earning capacity resulting from each. The language of (22) on which petitioners rely, when taken in context and construed in harmony with the purpose of the Act, means that the full rate shall be allowed for the duration of the healing time and that the proportionate rate shall apply to the balance of the established compensation period.

The decree will be modified so as to allow the full rate of $24.04 for only 32 weeks and proportionate compensation of 40 per cent for 282 weeks.

Modified and affirmed as modified.

A true copy.

Test:

Clerk, Supreme Court, U. S.